STATE OF WISCONSIN

IN SUPREME COURT

Case No. 99-1767-FT

In the Interest of Douglas D.,
A Person under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DOUGLAS D.,

Respondent-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A DECISION
OF THE COURT OF APPEALS,
DISTRICT III, AFFIRMING A DELINQUENCY
ADJUDICATION ENTERED IN THE
OCONTO COUNTY CIRCUIT COURT
Judge Richard DeLong

BRIEF AND APENDIX OF RESPONDENT-APPELLANT-PETITIONER

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ISSUES PRESENTED

I. **DID A DELINQUENCY ADJUDICATION, BASED ON THE CONTENT OF DOUGLAS'S CREATIVE WRITING ASSIGNMENT, VIOLATE HIS CONSTITUTIONAL RIGHT TO FREE SPEECH?**

The trial court held that the delinquency adjudication did not violate Douglas's First Amendment rights because "there is absolutely no social value achieved by the juvenile's conduct in completing an assignment allegedly that makes a direct threat to his teacher" (24:78; App. 110).

The court of appeals held that Douglas's writing constituted a "true threat," a category of speech not protected by the First Amendment (Slip Op. at ¶ 9; App. 105).

II. CAN WISCONSIN'S DISORDERLY CONDUCT LAW BE CONSTITUTIONALLY CONSTRUED TO CRIMINALIZE THE CONTENT OF A SCHOOL CREATIVE WRITING ASSIGNMENT?

The trial court held that the content of Douglas's creative writing assignment was "abusive conduct," based on its legal conclusion that language can be defined as "conduct" (24:76; App. 108).

The court of appeals held that the disorderly conduct statute applies to both "acts and (unprotected) words" (Slip Op. at ¶ 11-16; App. 106-07).

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case raises the intertwined questions of whether Douglas's creative writing assignment was speech protected by the First Amendment, and whether the disorderly conduct statute proscription against "abusive conduct" applies to the content of language, separate from abusive acts, or mode of expression.

These are important issues, warranting publication. Oral argument may be of assistance to the court in assessing the opposing arguments.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On October 7, 1998, 13-year-old Douglas D.'s eighth-grade English teacher gave him a creative writing assignment. He was to start a story that would be passed on to other students to finish. The assignment's title was "Top Secret," but no particular topic was assigned or prohibited. The assignment was to be completed during class (24:19-22).

Douglas did not immediately start his assignment, but instead talked with friends and "clowned around." This, according to the teacher, disrupted the class. She sent him to the hallway to start his story, and Douglas was "receptive" to her direction. She had no other disciplinary problems with Douglas on that day, and she described their relationship as "good." In fact, she checked on him while he was in the hallway, and commended him for doing his assigned work. At the end of the period, Douglas handed in his assignment and went to another class (24:13-15).

Douglas wrote the following story:

> There one lived an old ugly woman her name was Mrs. C. that stood for crab. She was a mean old woman that would beat children sencless. I guess that's why she became a teacher.
>
> Well one day she kick a student out of her class & he didn't like it. That student was named Dick.
>
> The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.
>
> When the sub came 2 days later she needed a paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C's head in the droor.

(20).

When teacher Caelwaerts read Douglas's assignment, after he had gone to his next class, she "panicked" and called the assistant principal (24:15-16). The assistant principal interpreted Douglas's writing as a threat to a staff member. He called Douglas to his office, where Douglas apologized, saying he did not intend any harm and that his story was not meant to be a threat to his teacher (24:33-34). Douglas never displayed animosity toward his teacher, and never gave the assistant principal the impression that he intended to do what he wrote about (24:35-36). Nevertheless, the assistant principal imposed an in-school disciplinary suspension.

When an Oconto County Department of Human Services juvenile court worker interviewed Douglas that day or the next, Douglas again said that he did not intend to threaten his teacher (24:53-58).

Upon returning to school the next week, Douglas told his teacher, at a meeting in the principal's office, that he was sorry and he didn't mean to hurt her (24:17).

On November 16, 1998, a juvenile court delinquency petition was filed, alleging that Douglas had "engaged in abusive conduct under circumstances in which the conduct tends to cause a disturbance," in violation of Wis. Stat. § 947.01. The petition cited the content of his creative writing assignment as a factual basis (1).

After a trial to the court, the judge found Douglas guilty of disorderly conduct, holding that the disorderly conduct statute applies to words, and that Douglas's assignment was not protected by the First Amendment (24:76-9; App. 108-11).

The Court of Appeals affirmed the delinquency adjudication, holding that the creative writing assignment was a "true threat" against the teacher, thus was not protected by the First Amendment (Slip Op. at ¶ 9;

App. 105). Further, it held that Wisconsin's disorderly conduct statute could be applied to language, unconnected to action (Slip Op. at ¶ 11-13; App. 106-07).

Douglas D.'s petition for review was granted by this court on February 22, 2000.

ARGUMENT

I. ADJUDICATING DOUGLAS DELINQUENT BECAUSE OF THE CONTENT OF HIS CREATIVE WRITING ASSIGNMENT, VIOLATED HIS CONSTITUTIONAL RIGHT TO FREE SPEECH.

Douglas's delinquency adjudication violated his right to free speech under the First Amendment to the United States Constitution, and Article I, Section 3 of the Wisconsin Constitution.

Douglas was punished for the content of a creative writing story he submitted to his teacher. This is "pure speech," which is entitled to comprehensive protection under the Constitution. ***Tinker v. Des Moines Independent Com. Sch. Dist.,*** 393 U.S. 503 (1969). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content [citation omitted]." ***Collin v. Smith***, 578 F. 2d 1197, 1201-02 (7th Cir. 1978).

Therefore, "content based regulations are presumptively invalid." ***R.A.V. v. City of St. Paul***, 505 U.S. 377, 382 (1992). Any such regulation must be "finely tailored to serve substantial state interests, and the justification offered for any distinctions it draws must be carefully scrutinized." ***Carey v. Brown***, 447 U.S. 455, 462-63 (1980).

A few carefully defined types of speech may be proscribed based on their content – obscenity, fighting words, defamation. ***R.A.V., supra*** at 383. In very narrow circumstances, the government may proscribe speech based on content if it "creates an imminent danger of a grave substantive evil." ***Brandenburg v. Ohio***, 395 U.S. 444, 447 (1969). But analysis of content restriction must begin with a "healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights." ***Collin, supra***, at 1202. The evil to be avoided must "rise[] far above public inconvenience, annoyance, or unrest." ***Terminiello v. City of Chicago***, 337 U.S. 1, 4 (1949).

Douglas's creative writing assignment is not obscene, libelous, or fighting words. ***Miller v. California***, 413 U.S. 15 (1973); ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964); ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (1942). Nor did Douglas advocate lawlessness or use of force in a way "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." ***Brandenburg, supra***, at 447.

The Court of Appeals decision held that Douglas's creative writing assignment was not protected by the First Amendment because it was a "true threat." (¶ 9; App. 105). However, his prosecution under Wisconsin's disorderly conduct statute fails to meet the Constitutional requirements regarding content-based regulation of threats. Additionally, Douglas's story was not "of such slight social value" as to be "clearly outweighed by the social interest in order and morality."

A. Douglas's creative writing assignment was not a "true threat," because it was not "unequivocal, unconditional, immediate and specific." Nor did the state meet its Constitutional burden to prosecute under a statute "finely tailored to serve substantial state interests," and to prove that Douglas intended his writing to intimidate his teacher.

In ***Watts v. United States***, 394 U.S. 705 (1969), the court considered the constitutionality of a content-based law prohibiting threats against the life of the United States president. Utilizing traditional First Amendment analysis, the court first found that the government has an "overwhelming" interest in protecting the president "and in allowing him to perform his duties without interference from threats of political violence." ***Id.*** at 707. However, it carefully weighed that governmental interest against First Amendment principles, saying:

> Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.
>
> . . . . For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

394 U.S. at 708 (citation omitted).

The court upheld the constitutionality of the statute, but found that the defendant's words, spoken at a

public rally, were **not** a true threat. "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J, " taken in context, and regarding the conditional nature of the statement, was political hyperbole, the court held. 394 U.S. at 706-8.

In ***United States v. Kelner***, 534 F. 2d 1020 (2nd Cir. 1976), the court discussed ***Watts***, in determining whether Kelner's telecast statement that he planned to assassinate Yassar Arafat during his visit to the United States, was a "true threat." It held:

> The purpose and effect of the *Watts* constitutionally-limited definition of the term "threat" is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished . . . .
>
> So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

Id. at 1027.

In ***U.S. v. Gilbert***, 813 F. 2d 1523 (9th Cir. 1987) the court pointed out that "true threats" cannot be constitutionally proscribed unless the controlling laws are "narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society" ***Id.,*** at 1529, quoting from ***Broadrick v. Oklahoma***, 413 U.S. 601, 611-12 (1973). The statute on threats against the life of the president, of course, meets those criteria by narrowly defining the offense and by identifying an "overwhelming" interest in allowing the president to perform his duties without interference from threats of physical violence. ***Watts, supra***, at 707.

The statute under consideration in ***Gilbert*** was the Fair Housing Act, again expressly criminalizing threats of force designed to intimidate or interfere with housing rights. The "statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech," the court held. ***Gilbert, supra***, at 1529.

Douglas's prosecution fails the First Amendment tests for content-based regulation of threatening language, for three reasons. First, the disorderly conduct statute is not "narrowly drawn," representing a "considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." It is a general statute, aimed at a wide variety of "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct." As will be discussed more completely in Part II of this brief, Wisconsin's disorderly conduct statute is designed to regulate "nonverbal expressive activity" or noncontent elements of speech, such as noise. It is not narrowly drawn enough to regulate content.

Second, Douglas's fictional story was not an "unequivocal, unconditional and specific expression[] of intention immediately to inflict injury," as defined in ***Kelner, supra***. Another way of formulating this definition of a "true threat," set forth in ***United States v. Hoffman***, 806 F. 2d 703, 707 (7th Cir. 1986), is that a reasonable person would foresee that the persons receiving the statement would interpret it "as a serious expression of an intention to inflict bodily harm upon or to take the life of" another.

In ***Kelner***, the defendant had stated in a television news interview: "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive . . . . We are planning to assassinate Mr. Arafat . . . .

Everything is planned in detail." ***Kelner, supra***, at 1025. These statements, not made in a jesting manner, and in connection with military uniforms and a .38 pistol, the court held, were unambiguous, specific, and immediate, thus constitute a true threat

Similarly, in ***Hoffman, supra***, at 704, the defendant's letter saying, "Ronnie [Reagan], Listen Chump! Resign or You'll Get Your Brains Blown Out," illustrated by a picture of a gun with a bullet emerging from the barrel, was held to be a serious expression of an intention to inflict bodily harm upon or take the life of the president.

A review of other cases in which threats have been found to be criminally punishable under narrowly-drafted legislation shows that in each case the threat was unequivocal, unconditional, specific and immediate: "take these fucking handcuffs off and I'll kick your fucking ass," spoken to a law enforcement officer and accompanied by pushes and elbowing, ***United States v. Orozco-Santillan***, 903 F. 2d 1262, 1264 (9th Cir. 1990); a poster-like "Wanted" paper containing pictures of Israeli and American officials with the words "execute now!" and "His blood need," and "Must be killed," written next to them, sent to the Jewish National Fund by a person who had repeatedly called the Fund making heated and profane statements including "death to all Jews," ***United States v. Khorrami***, 895 F. 2d 1186, 1188-89 (7th Cir. 1990); and "[w]hite persons consorting with blacks will be dealt with according to the Miscegenation Section of the Revolutionary Ethic . . . [miscegenation] will be punished by Death, Automatic by Public Hanging," sent to an interracial adoption agency by a man who had tried to run over an adopted black child and who had made direct death threats to other adopted black children, ***United States v. Gilbert***, 884 F. 2d 454, 456 (9th Cir. 1989).

In a school setting, the court in ***Lovell v. Poway Unified School District***, 90 F. 2d 367, 372 (9th Cir. 1996), considered whether a frustrated and irritable student's statement to a school counselor was a "true threat." In that case, the lower court had found that the evidence was evenly balanced on the crucial factual issue of what the student had said. If she said, "If you don't give me this schedule change, I'm going to shoot you," the court found that the statement was "unequivocal and specific enough to convey a true threat of physical violence." ***Id.*** at 372. However, if the student said, "I'm so frustrated I could just shoot someone," the court held that "it is not clear that one should foresee that such a statement will be interpreted as a serious expression of intent to harm." ***Id.*** at 373.

Douglas D.'s fictional, third-person creative writing assignment was not an "unequivocal, unconditional and specific expression of intention immediately to inflict injury," and it could not reasonably be taken as a serious expression of Douglas' intention to inflict bodily harm. First and foremost, it was **fiction**. The assignment's title was "Top Secret," inviting students to use imagination, even fantasy. Its main character was a fictional person named Dick. The story can most rationally be characterized as literary farce rather than some sort of true threat. It was not, as in the examples above, a straightforward "unequivocal, unconditional and specific" statement of an intent to harm a teacher.

Second, all of the context evidence weighed **against** an intention to inflict bodily harm. Douglas had not reacted angrily when the teacher sent him to the hallway, he conscientiously worked on his assignment in the hallway, he handed his assignment in as requested and went to his next class, he immediately and continuously disavowed any intent to threaten his teacher, and he did not own a machete. There was no evidence that Douglas

had ever acted angrily or violently before or after this incident.

Third, the disorderly conduct statute does not require the state to prove beyond a reasonable doubt that Douglas intended to intimidate. When a statute governs the content of speech, the "requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." ***Gilbert, supra***, at 1529. Douglas repeatedly and expressly denied any intent to threaten or harm his teacher, but the state was not required to prove such an intent, and the court was not required to find intent in order to adjudicate Douglas delinquent. The constitutional insulation was completely lacking.

Wisconsin does have a statute, more narrowly drawn than the disorderly conduct law, that criminalizes threats to harm another person, if the threat is made "with the intent to harass or intimidate another person." Wis. Stat. § 947.013. However, the state chose not to prosecute him under that law.

Douglas was not prosecuted under a narrowly drawn statute making "intent to intimidate" an element of the crime, nor was his fictional story an "unequivocal, unconditional and specific expression of intention immediately to inflict injury." Therefore, his creative writing assignment could not be prosecuted under the disorderly conduct statute as a "true threat." It was entitled to full First Amendment protection against content regulation.

B. Douglas's attempt to write a fictional story was not "of such slight social value" as to be "clearly outweighed by the social interest in order and morality."

The reason the courts have permitted restriction upon the content of speech in a few limited areas, is that

some speech is considered to be "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 572 (1942), quoted in ***R.A.V. v. City of St. Paul, supra*** at 383. Douglas's creative writing attempt has significant, social value, as a necessary part of his education.

The Supreme Court has recognized many times that protection of students' rights to free speech is integral to the educational process. "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . ." ***Sweezy v. New Hampshire***, 354 U.S. 234, 250 (1957). ***See also Shelton v. Tucker***, 364 U.S. 479 (1960). Accordingly, students do not shed their constitutional rights to freedom of speech at the schoolhouse door. ***Tinker v. Des Moines Independent Community School District***, 393 U.S. 503, 505 (1969).

Douglas's story shows that he was trying to comply with his teacher's direction. He wrote the beginning of a fictional story. He signaled its fictional nature in the first few words, saying "there on[c]e lived," a variation of "once upon a time." He used imagination and fantasy, as suggested by the teacher's naming it "Top Secret" and identifying it as a "creative writing" assignment. It has an element of humor: "She was a mean old woman that would beat children sencless. I guess that's why she became a teacher." It has an element of suspense, and it ends at a point where the next writer can develop the substitute teacher's response, perhaps giving the story a new twist. It is crude, certainly lacking the polish of a professional horror story, but it reflects an honest attempt on the part of a 13-year-old boy, to write the kind of story he has read in literature or watched in a theater.

As the court held in ***Thomas v. Board of Education, Granville Central School District***, 607 F. 2d 1043, 1047 (2nd Cir. 1979):

> [W]e have granted First Amendment protection to much speech of questionable worth, rather than force potential speakers to determine at their peril if words are embraced within the protected zone. To avoid the chilling effect that inexorably produces a silence born of fear, we have been intentionally frugal in exposing expression to government regulation.

Thomas v. Board of Education involved censorship of a publication called "Hard Times," a student attempt to emulate "National Lampoon." It was vulgar and distasteful, but an honest exercise in writing and publishing. ***Id.*** at 1045.

Students need to be able to try, to make mistakes, and to learn from their mistakes, in order to improve. To criminalize Douglas's creative effort in this case stifles creativity, and makes it dangerous to take chances and make mistakes. It is the antithesis of the educational process. Finally, it violates the clear principle that government censorship may not create a chilling effect on speech.

Douglas's creative writing assignment was not a "true threat." His adjudication of delinquency, based on the content of his story, violates his Constitutional free speech rights.

II. WISCONSIN'S DISORDERLY CONDUCT LAW DOES NOT CRIMINALIZE THE CONTENT OF A SCHOOL CREATIVE WRITING ASSIGNMENT.

Even if this court finds that Douglas's writing is not protected by the First Amendment, Wis. Stat. § 947.01, does not define the crime of disorderly conduct to prohibit language based on its content. "Questions

involving statutory construction are afforded independent review without the necessity of deferring to the conclusions of the lower court." ***City of Oak Creek v. King***, 148 Wis. 2d 532, 539, 436 N.W.2d 285, 287 (1989).

Under Wisconsin law, "whoever . . . engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of [disorderly conduct]." Wis. Stat. § 947.01. The *actus reas* of the offense is conduct or an act of a specific nature (violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly), done under circumstances likely to provoke a particular response (a public disturbance).

Douglas's "act" was writing a fictional third-person story in a school hallway. Writing on a piece of paper is not an abusive or otherwise disorderly act. In fact, teacher Caelwaerts commended Douglas on the manner in which he was completing his assignment (24:13-14).

The state argues in its response to the petition for review that Douglas's disorderly "act" was handing in his assignment. It does not explain, and Douglas cannot imagine, how a student's compliance with a teacher's request to hand in an assignment can be defined as an abusive or disorderly act.

Moreover, the circumstances under which Douglas wrote his assignment, handed it in, and moved to his next class, cannot rationally be viewed as circumstances under which his conduct would "tend[] to cause or provoke a disturbance." The "disturbance" intended by the statute is disruption of public disorder. ***State v. Zwicker***, 41 Wis. 2d 497, 508, 164 N.W.2d 512 (1969). Personal discomfort or fear is not public disorder. ***State v.***

Werstein, 60 Wis. 2d, 668, 673-74, 211 N.W.2d 437 (1973).

There was no evidence that Douglas's written assignment caused a public disturbance or that it was likely to provoke one. In any event, otherwise orderly conduct that causes a disturbance does not satisfy the elements of disorderly conduct. ***State v. Werstein***, ***supra***, at 674.

A. Wisconsin's disorderly conduct statute does not criminalize abusive speech, unless the speech is intertwined with actions that are both disorderly and likely to cause a disturbance.

Wisconsin Statute § 947.01 has withstood Constitutional overbreadth challenges precisely because our courts have held that it does not proscribe abusive or offensive language, unless that language is either delivered in a manner, or intertwined with actions that are both disorderly and likely to provoke a disturbance.

In ***State v. Zwicker***, 41 Wis. 2d 497, 509, 164 N.W.2d 512 (1969), the court said:

> The language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitution. **The mere propounding of unpopular views will not qualify for conviction. The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud or conduct similar thereto,** and under circumstances in which such conduct tends to cause or provoke a disturbance.

(Emphasis added).

The ***Zwicker*** decision is grounded in traditional First Amendment analysis, holding that "nonverbal

expressive activity can be banned because of the action it entails, but not because of the idea it expresses," and that speech may be regulated on the basis of a "noncontent element (e.g. noise)." ***R.A.V. v. City of St Paul, Minnesota***, 505 U.S. 377, 381-382 (1992). Therefore, as the court held in ***Zwicker***, the disorderly conduct statute can constitutionally regulate action, or the mode in which messages are conveyed, but not the content of the words.

A review of Wisconsin disorderly conduct cases reveals no case in which the disorderly conduct statute was applied to words, unaccompanied by disorderly actions. In ***Zwicker, supra***, the court rejected a factual contention that Zwicker was convicted for "merely peacefully holding a sign in a public building." To find a factual basis for 'intertwined conduct," the court pointed out that he had held the sign over his head in defiance of a known rule, urged others to do the same, and went limp when police came to arrest him. ***Id.*** at 512.

Similarly, in ***State v. Becker***, 51 Wis. 2d 659, 188 N.W. 2d 449 (1970), the court found insufficient evidence of disorderly conduct based on Becker's yelling at police, saying there was no evidence that it was unreasonably loud or offensive. Rather, the court found a factual basis for his conviction based on his "pushing and jostling of a police officer—violent conduct." ***Id.*** at 666.

This limitation of the meaning of Wisconsin's disorderly conduct statute is further buttressed by the decision in ***Wauwatosa v. King***, 49 Wis. 2d 398, 182 N.W. 2d 530 (1971), involving the constitutionality of an ordinance prohibiting picketing near the home of an individual. The court's decision began, at 404, with this statement of principle:

> Freedom of speech is to be jealously guarded, but, when intertwined with conduct, total freedom stops and the right to regulate begins. Picketing, demonstrating and parading involve conduct that can be regulated.

Despite the clear holdings of ***Zwicker*** and ***City of Wauwatosa, supra,*** the Court of Appeals in its decision cited ***Teske v. State***, 256 Wis. 2d 440, 444, 41 N.W.2d 642, 644 (1950), for the principle that disorderly "conduct" describes both acts and (unprotected) words. ***Teske*** does not support that broad principle.

In ***Teske,*** a picket line confrontation with law enforcement officers resulted in disorderly conduct convictions. The picketers argued that "*acts* of a person are not prohibited by its [the disorderly conduct statute] provisions, that they reach only *language* of the character described." (***Id.*** at 444, emphasis in original). The question before the court, therefore, was only whether the disorderly conduct statute applied to acts. The court held that it did, in the passage referred to by the Court of Appeals:

> The words of the statute must be read in the disjunctive, that is, they make it an offense to use such language or to engage in disorderly conduct tending to the result described. The statute was enacted in 1947, undoubtedly to supply an omission in the existing law and to reach such acts as are here charged. If it had been intended to prohibit only offensive language there would have been no need for the use of the words, "otherwise disorderly conduct."

The court's language about offensive language in ***Teske*** was *dicta*. The court did not take up, discuss or decide whether offensive language, alone, violated the disorderly conduct statute, because the question was whether acts could violate the statute. This court need not follow or give weight to the *dicta* in ***Teske***. *See* ***State v. Koput***, 142 Wis.2d 370, 386 n. 12, 418 N.W.2d 804, 811 n. 12 (1988).

Moreover, if the ***Teske*** court had considered the question whether the disorderly conduct applied to "offensive language," it would have confronted the United States Supreme Court's decision in ***Terminiello v.***

Chicago, 337 U.S. 1 (1949). In ***Terminiello***, the court found that a breach of peace ordinance was unconstitutional because it included among its prohibitions, speech which "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance . . ." ***Id.*** Because such a prohibition violates the First Amendment, the statute was held to be unconstitutional. If the ***Teske*** court had held that "offensive language" was prohibited by Wisconsin's disorderly conduct statute, it would have been compelled by the ***Terminiello*** decision to find Wisconsin's statute overbroad, in violation of the First Amendment.

Additionally, ***Teske*** was decided in 1950, before a series of First Amendment challenges to breach of the peace and disorderly conduct statutes in the 1960's and 1970's, which resulted in broadly-construed statutes being found unconstitutional. In ***Edwards v. South Carolina***, 372 U.S. 229 (1963) and ***Cox v. Louisiana***, 379 U.S. 538 (1965), the United States Supreme Court struck down breach of peace statutes because, as explained by the court in **Cox**, "the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly." ***Id.*** at 552. In ***Gooding v. Wilson*** , 405 U.S. 518 (1972), the court struck down a statute criminalizing "abusive" language, as an unconstitutional infringement of the freedom of speech. In ***Lewis v. City of New Orleans***, 415 U.S. 130 (1974), a statute prohibiting "opprobious language" to policeman was struck down as unconstitutional.

Faced with a similar challenge in ***Zwicker, supra***, the Wisconsin Supreme Court avoided a constitutional overbreadth challenge by narrowly construing the disorderly conduct statute. It held that that the statue did not apply to constitutionally protected conduct, such as "propounding of unpopular views." It only proscribed "activities intertwined with protected freedoms," if those activities are carried out in a "violent, abusive, indecent,

profane, boisterous or unreasonably loud" manner. ***Id.*** at 509.

Subsequently, the Wisconsin Supreme Court has twice determined that statutes that can be construed to apply to abusive or offensive language, unaccompanied by action, are unconstitutional, as infringing on the right to free speech. In ***State v. Dronso***, 90 Wis. 2d 110, 279 N.W.2d 710 (Ct. App. 1979), the court struck down, as overbroad and unconstitutional, a part of the disorderly conduct statute, at Wis. Stat. § 947.01(2), prohibiting telephone calls made with the intent to annoy. It did so, the court held, because it could not subject that part of the statute to a narrowing construction that avoided its application to protected speech.

Similarly, in ***Milwaukee v. Wroten***, 160 Wis. 2d 207, 230, 466 N.W.2d 861 (1991), the court found unconstitutional a Milwaukee city ordinance prohibiting interference with a police officer, saying: "If these words refer exclusively to conduct, they are constitutionally acceptable. If, however, they can also apply to verbal expressions which are not "fighting words," the ordinance is . . . overbroad and constitutes an infringement upon protected speech."

In ***Wroten***, the court clearly distinguished between "conduct" and "verbal expressions" in determining the constitutionality of the ordinance. This distinction is entirely consistent with the interpretation of the disorderly conduct statute in ***Zwicker***, and similarly avoids an overbroad interpretation of the regulation which would infringe on protected speech. ***See Gooding v. Wilson***, ***supra***, at 415 U.S. 518,

The Wisconsin Supreme Court's interpretation of the disorderly conduct statute, in ***State v. Zwicker, supra*** at 509, as prohibiting only "activities" that are "carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud or conduct

similar thereto, and under circumstances in which such conduct tends to cause or provoke a disturbance," remains the definitive construction of the statute, and should be applied by the court to the facts of this case.

There was no evidence that Doug's actions or *conduct* was abusive, or that his mode of communication was unreasonably loud, boisterous, indecent, profane, abusive or violent. The court, erred, therefore, in finding that he had violated the disorderly conduct statute.

B. Wisconsin's disorderly conduct law proscribes conduct likely to provoke a disturbance to the public disorder, not personal discomfort.

The disorderly conduct law prohibits conduct committed "under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01. The "disturbance" intended by the statute is disruption of "public order." ***State v. Zwicker, supra,*** at 508.

The court applied the "public order" definition of disturbance in ***State v. Werstein***, 60 Wis. 2d, 668, 673-74, 211 N.W. 2d 437 (1973), when it rejected an argument that the peaceful presence of demonstrators in an Armed Forces entrance and examining station (AFEES) constituted disorderly conduct. It dismissed the state's contention that the demonstrator's presence "caused the AFEES personnel to fear for their safety" by citing ***Brown v. Louisiana***, 383 U.S. 131 (1966). In ***Brown***, a librarian was "unnerved" by the presence of African Americans in a "segregated" library, but the court found nothing in the statute that would "elevate the giving of cause for Mrs. Reeves' discomfort, however we may sympathize with her, to a crime against the State of Louisiana." ***Id.*** at 141. Likewise, the ***Werstein*** court refused to equate personal discomfort or fear with provoking a disturbance of the public order.

This case is like ***Werstein***. Although the evidence shows that teacher Caelwaerts was upset by the content of Doug's fictional story, there was no evidence that Doug's orderly writing of his assignment, handing it to his teacher as requested, and proceeding to his next class, was likely to provoke a public disturbance.

The court's holding in ***Bachowski v. Salamone***, 139 Wis. 2d 397, 407 N.W.2d 533 (1987) provides further evidence of legislative intent that disorderly conduct is directed to disturbance of the public order, not personal discomfort. In construing and considering the constitutionality of Wis. Stat. § 947.013, governing harassment, the court held that the "purpose of the legislation was to extend to the individual the protections long afforded to the general public under disorderly conduct or breach of peace statutes." ***Id.,*** at 409. If disorderly conduct extended to private interaction, or personal feelings of discomfort, there would have been no need for § 947.013. Special 'harassment" legislation was necessary because disorderly conduct couldn't be stretched so far.

The state suggests in its Response in Opposition to Petition for Review that, "In this post-Columbine era, however, it is difficult to argue that a threat of violence . . . would not have a tendency to disrupt the public order." (¶ 4).

Douglas urges this court not to be swayed, in performing its Constitutional function, by exaggerated media reports and public misperceptions about school violence. A recent report of the Safe Schools Task Force, co-sponsored by the Wisconsin Departments of Justice and Public Instruction, states: "Research shows that Wisconsin's schools are very safe. While the headline-grabbing incidents of school violence are tragedies and need our attention, we must understand that school violence, like violence in general, is declining." (Nov. 1999). On the national level, there were only 26 school-

associated violent deaths in 1999, in a population of 52 million American students. In 1999, there was a one in two million chance of being killed in one of America's schools. (*School House Hype II*, by Justice Policy Institute and Children's Law Center, at www.cjcj.org/schoolhousehype).

CONCLUSION

Douglas D. was, at the time he wrote his assignment, 13 years old, the child of an abusive father. For his age, background and level of maturity, he handled his frustration at being sent to the hall, in a constructive way. He didn't disrupt the class, strike out, or allow negative thoughts to fester; he expressed himself on paper. When confronted, he repeatedly disavowed any threatening intent, and apologized to his teacher. The school imposed discipline, but did not exclude him from school in the belief that he was a threat to school safety.

Finding Douglas delinquent as guilty of disorderly conduct, based on the content of his fictional story, violates his state and federal constitutional right to freedom of speech. Further, the trial court erred by construing Wisconsin's disorderly conduct statute to apply to the content of his written, fictional, third-person story.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 5,894 words.

Dated this 30th day of March, 2000.

Signed:

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1767-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE INTEREST OF DOUGLAS D.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DOUGLAS D.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: RICHARD D. DELFORGE, Judge. *Affirmed.*

¶1 HOOVER, P.J. Douglas D. appeals a judgment adjudicating him delinquent for violating the disorderly conduct statute, § 947.01, STATS., based upon the content of a creative writing assignment he submitted to his English

teacher.[1] Douglas contends that his assignment constitutes pure speech protected by the First Amendment and that punishing him for his speech is therefore unconstitutional. This court concludes that the content of Douglas's writing assignment constitutes a true threat that is not protected by the First Amendment and that unprotected speech may be proscribed under the disorderly conduct statute. Accordingly, the judgment is affirmed.

¶2 The relevant facts are not in dispute. Douglas's English teacher gave him a creative writing assignment that called for Douglas to start a story that would be passed on to other students to finish. The assignment's title was "Top Secret," but no particular topic was assigned or prohibited. The assignment was to be completed during class.

¶3 Douglas did not immediately start his assignment, but instead talked and visited with friends. This, according to his teacher, disrupted the class. She sent Douglas into the hallway to start his story. At the end of the period, Douglas handed in his assignment and went to another class.

¶4 Douglas wrote the following:

> There one lived an old ugly woman her name was Mrs. C.[2] that stood for crab. She was a mean old woman that would beat children sencless. I guess that's why she became a teacher.
>
> Well one day she kick a student out of her class & he din't like it. That student was naned Dick.

---

[1] This is an expedited appeal under RULE 809.17, STATS.

[2] Douglas's teacher's last name began with the letter "C." The circuit court heard evidence that Douglas refers to his teacher as "Mrs. C."

> The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.
>
> When the sub came 2 days later she needed a paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C's head in the droor.

¶5 After reading Douglas's assignment, his teacher became upset and called the assistant principal. The assistant principal interpreted Douglas's paper as a threat to a staff member. He called Douglas to his office where Douglas apologized, saying that he did not intend any harm and that his story was not meant to be a threat to his teacher.

¶6 The State filed a delinquency petition alleging that Douglas had engaged in abusive conduct that tended to cause a disturbance in violation of § 947.01, STATS. Douglas's creative writing assignment provided the basis for the charge. After a fact-finding hearing, the court found Douglas delinquent. The court, considering the story's content and the circumstances in response to which it was written, rejected Douglas's claim that his contribution to the class assignment was protected by the First Amendment. It found that "[t]here is no question" Douglas's paper constituted a "direct threat" to Douglas's teacher. The circuit court further found that the story not only tended to, but did provoke a disturbance.[3] Finally, it determined that the story's content unreasonably offended

[3] Douglas attempts to characterize his story as "a third-person story describing a violent act [written] as a creative writing assignment." He does not, however, advance an argument that the circuit court's finding was clearly erroneous. Nor could he. The writing was composed after Douglas had been disciplined in front of his classmates for disruptive behavior and conveys the message that if "Mrs. C" were to admonish him again, she should be prepared to defend herself from harm. ("The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.") Similarly, Douglas does not condemn as clearly erroneous the trial court's implicit finding that the threat was of a nature that would tend to cause a disturbance.

the senses or sensibilities of others in the community and was devoid of social value.[4]

¶7 Douglas contends that he is being unconstitutionally punished for exercising his right to free speech. This case involves the application of constitutional principles and a statute to a set of undisputed facts. An appellate court is not bound by the trial court's conclusions of law and must decide the matter de novo. *See* ***In re Smith***, 229 Wis.2d 720, 600 N.W.2d 258, 260 (Ct. App. 1999); *see also* ***Bose Corp. v. Consumers Union of United States, Inc.***, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that the 'judgment does not constitute a forbidden intrusion on the field of free expression.'") (quoted source omitted).

¶8 This court first examines whether Douglas's speech was protected by the First Amendment. The right to free speech is not absolute. For example, speech may be punished if it presents a clear and present danger of a serious substantive evil that rises far above inconvenience, annoyance or unrest. *See* ***Terminiello v. City of Chicago***, 337 U.S. 1, 4 (1949). In addition to speech that creates a clear and present danger, there are other classes of speech that receive

---

[4] Douglas contends that ***State v. Janssen***, 219 Wis.2d 362, 389, 580 N.W.2d 260, 271 (1998), "rejected a weighing of offensiveness against social value." Janssen was prosecuted for flag desecration after he defecated on an American flag. In a decision authored by Justice John P. Wilcox, the supreme court struck down the flag desecration statute as facially overbroad. At the end of the opinion, while expressing the court's sense of repugnance Janssen's conduct provoked, Justice Wilcox observed that defecating on the American flag was an act without social value. This court is not prepared to accord precedential value to a comment the supreme court made as part of a gratuitous expression of distaste for the conclusion the constitution compelled in the case before the court. In any event, in light of the circuit court's "direct threat" finding, its comment regarding social value is immaterial. This court observes, without deciding, that "true threats" may constitute a subspecies of proscribable "clear and present danger" expression.

limited or no First Amendment protection. They include: (1) obscenity, ***Miller v. California***, 413 U.S. 15, 24 (1973); (2) fighting words, ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 572 (1942); (3) libel, ***New York Times Co. v. Sullivan***, 376 U.S. 254, 267 (1964); (4) commercial speech, ***Ohralik v. Ohio State Bar Assn.***, 436 U.S. 447, 456 (1978) and; (5) words likely to incite imminent lawless action, ***Brandenburg v. Ohio***, 395 U.S. 444 (1969).

¶9 Douglas argues that the State failed to show a clear and present danger of a serious substantive evil justifying punishment and that his creative writing does not fall within any of the other five categories. As the trial court determined, however, Douglas's writing does fall within another category of speech that is not protected by the First Amendment, namely, true threats.[5] Threats of violence are outside the First amendment and thus proscribable because of the government's interest in "protecting individuals from the fear of violence, from the disruption that fear engenders and from the possibility that the threatened violence will occur." ***R.A.V. v. St. Paul, Minn.***, 505 U.S. 377, 388 (1992). "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.*; *see also* ***State v. Zwicker***, 41 Wis.2d 497, 509, 164 N.W.2d 512, 518 (1969) (disorderly conduct statute proscribes acts that

[5] *See, e.g.,* ***Watts v. United States***, 394 U.S. 705 (1969) (per curiam) ("True threats" are not protected by the first amendment.) A threat is a "true threat" when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." ***United States v. Orozco-Santillan***, 903 F.2d 1262, 1265 (9th Cir. 1990). "[T]hreats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.*, (citing ***United States v. Gilbert***, 884 F.2d 454, 457 (9th Cir. 1989)). Whether the circumstances demonstrate a "true threat" is a question of fact. *See* ***United States v. Khorrami***, 895 F.2d 1186, 1192 (7th Cir. 1990). As indicated, Douglas does not argue that the circuit court's finding of a direct threat was clearly erroneous. This court discerns no material difference in connotation between the phrase "true threat" and "direct threat."

would menace); ***State v. Dronso***, 90 Wis.2d 110, 115, 279 N.W.2d 710, 713 (Ct. App. 1979) (distinguishing nonproscribable "intent to annoy" from threats to injure). This court concludes that Douglas's composition's expression of a true threat is not protected by the First Amendment.

¶10 Douglas further contends that the disorderly conduct statute does not criminalize protected speech unless that speech is intertwined with conduct that is both disorderly and likely to cause a disturbance. He claims that his writing was pure speech, not intertwined with conduct other than putting paper to pen, and was therefore entitled to First Amendment protection.

¶11 This court rejects Douglas's pure-protected-speech contention for two reasons. First, as indicated, true threats are not protected. Second, Douglas's assertions that the disorderly conduct statute may not be applied to pure speech is incorrect. Douglas relies on the following passage in ***Zwicker***, 41 Wis.2d at 509, 164 N.W.2d at 518, as support for his position:

> The language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitution. The mere propounding of unpopular views will not qualify for conviction. The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, *and* under circumstances in which such conduct tends to cause or provoke a disturbance. Prohibition of conduct which has this effect does not abridge constitutional liberty.

¶12 The ***Zwicker*** court's use of the term "conduct" is not, however, confined to describing only physically disorderly acts. Our supreme court long ago used the word to describe both acts *and* (unprotected) words. *See* ***Teske v. State***, 256 Wis. 440, 444, 41 N.W.2d 642, 644 (1950), cited in ***State v. Givens***, 28

Wis.2d 109, 116, 135 N.W.2d 780, 784 (1965), and most recently in ***City of Oak Creek v. King***, 148 Wis.2d 532, 541, 436 N.W.2d 285, 288 (1989); *see also, R.A.V.*, 505 U.S. at 389 (words can in some circumstances violate laws directed not against speech but against conduct). Thus, Douglas was subject to a delinquency prosecution based solely on the threat his writing conveyed.

¶13 Upon this court's conclusion that the content of Douglas's writing assignment is not constitutionally protected and that unprotected speech may be punished under the disorderly conduct statute, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

citizen, not one, that there has been abuse to a citizen in this community by Exhibit No. 1.

THE COURT: Thank you, Mr. Gower. Anything else, Mr. Mraz?

MR. MRAZ: No.

THE COURT: Good. I'm going to take about a five-minute break, and then we'll come back in and I'll give you my decision.

(Recess taken at 3:48 p.m.)

THE COURT: We're back on the record and the appearances are the same as they were earlier this afternoon. Disorderly conduct as defined in the Wisconsin Criminal Code as charged in the petition today is committed by a person who in a public place engages in abusive conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

Now, before the juvenile may be found delinquent of committing disorderly conduct, the petitioner must prove by evidence which satisfies the Court beyond a reasonable doubt that the following two elements were present: The first element requires that the juvenile engaged in abusive conduct. That conduct can be either physical acts or language. The conduct here

was the result of a class assignment identified as Petitioner's Exhibit No. 1.

I would like to read that into the record. "There one lived an old ugly woman. Her name was Mrs. C. That stood for crab. She was a mean old woman that would beat children senseless. I guess that's why she became a teacher. One day she kicked a student out of her class and he didn't like it. That student was named Dick. The next morning Dick came to class and in his coat he concealed a machete. When the teacher told him to shut up, he ripped it out and cut her head off. When the sub came two days later, she needed a paper clip, so she opened the door. Ahh she screamed, and she found Mrs. C's head in the door."

MR. GOWER: Drawer.

THE COURT: I read it to be door, but it could be drawer. Thank you, Mr. Gower.

Mrs. Caelwaerts has testified today that she is known in her class as Mrs. C. She signs papers in her class as Mrs. C. Mr. Schultz testified today that the day after this incident he had talked to the juvenile, and the juvenile told him that the Mrs. C referred to in Petitioner's Exhibit No. 1 was Mrs. Caelwaerts.

Now, the principle upon which the offense of disorderly conduct is based is that in an organized society one should so conduct themselves as not to reasonably offend the senses or sensibilities of others in the community. In determining whether the conduct unreasonably offends the public, the Court weighs the degree to which the decency and propriety were to the public interest made by the conduct. Conduct unreasonably offends the public's sense of decency and propriety if and only if the harm to the public outweighs the social value achieved by the defendant's conduct.

Here there is absolutely no social value achieved by the juvenile's conduct in completing an assignment allegedly that makes a direct threat to his teacher. That is not the type of activity that is allowed either under the First Amendment or any other right that a student has in a classroom.

The second element of the offense requires that the juvenile's conduct under circumstances as they then existed tend to cause or provoke a disturbance. It's obvious here that it did cause and provoke a disturbance as Mrs. Caelwaerts was very upset at receiving and reading this information on Petitioner's Exhibit No. 1 from the juvenile.

The circumstances as they existed are a classroom setting. The juvenile was disciplined in class. He was asked to do an assignment out in the hallway, and then he writes Exhibit No. 1 which is in no other way that I can view this as a direct threat to his teacher, Mrs. Caelwaerts. Mrs. C and Mrs. Caelwaerts are one in the same. The juvenile has indicated through his social worker, Mr. Schultz, who testified today, that he did refer to Mrs. Caelwaerts as Mrs. C.

There is no question that this is a direct threat to the teacher. This is not the type of action that we're going to allow in our community. It's not the type of action that we're going to allow in our classrooms, and, therefore, I find that the petitioner has met his burden of proof, and I will find that the juvenile has committed the offense of disorderly conduct, and I will find him delinquent.

We will then have to schedule this matter for a dispositional hearing. Mr. Schultz, how long will it take for you to prepare your report?

MR. SCHULTZ: If I could have a couple of weeks at least, Your Honor.

THE CLERK: What about March 29 in the morning at 8:30?

STATE OF WISCONSIN
IN SUPREME COURT

No. 99-1767-FT

In the Interest of Douglas D.,
a Person under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DOUGLAS D.,

Respondent-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT ENTERED IN THE OCONTO COUNTY CIRCUIT COURT, THE HON. RICHARD D. DELFORGE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER-RESPONDENT

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IN SUPREME COURT

No. 99-1767-FT

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BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER-RESPONDENT

ISSUES PRESENTED

1. Was Douglas D.'s written threat to harm his teacher protected by the First Amendment?

The circuit court and the court of appeals held that Douglas's writing was a true threat that was not constitutionally protected.

2. Is a student's written threat to harm a teacher that is personally delivered to the teacher at school punishable as disorderly conduct?

The circuit court and the court of appeals found that Douglas committed disorderly conduct when he handed his teacher a written threat.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication are appropriate.

STATEMENT OF THE CASE

This case is before the court on respondent-appellant-petitioner Douglas D.'s petition for review of a decision of the court of appeals, District III, that affirmed a judgment of the Oconto County Circuit Court, the Honorable Richard D. Delforge, presiding. The judgment adjudicated Douglas delinquent for violating the disorderly conduct statute, Wis. Stat. § 947.01.

Douglas was an eighth-grade student at the Washington School in Oconto when the events giving rise to this case took place (24:11-12). On October 7, 1998, Douglas's English teacher, Mrs. Rockie Caelwaerts, gave Douglas's class a creative writing assignment that was to be completed during class (24:12-13). Douglas did not immediately start his assignment, but instead disrupted the class by talking and visiting with friends (24:13-14). Mrs. Caelwaerts sent Douglas into the hallway to work on his story (*id.*).

After completing the assignment, Douglas handed it to Mrs. Caelwaerts at her desk (24:14). Douglas wrote the following:

> There one lived an old ugly woman her name was Mrs. C. that stood for crab. She was a mean old woman that would beat children sencless. I guess that's why she became a teacher.
>
> Well one day she kick a student out of her class & he din't like it. That student was named Dick.
>
> The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.
>
> When the sub came 2 days later she needed a paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C's head in the droor.

20; R-Ap. 101.

Mrs. Caelwaerts read Douglas's assignment a couple of minutes after he handed it to her (24:14). She became very upset and "panicked" because Douglas "wrote that he was going to cut my head off with a machete" (24:15). She believed that she was the "Mrs. C" in Douglas's story because she referred to herself as "Mrs. C" in the classroom and signed papers "Mrs. C" (24:27).

There were about five minutes left in the class when Mrs. Caelwaerts read Douglas's assignment (24:16). After getting the class together to leave, Mrs. Caelwaerts immediately called the assistant principal, Jeffrey Werner (*id.*)

Mr. Werner testified that Mrs. Caelwaerts appeared very upset and threatened by Douglas's essay (24:32, 35). He concluded that Douglas had threatened Mrs. Caelwaerts based on the essay's "veil[ed] threats," the use of "Mrs. C" to refer to the teacher, and the similarity in name of the essay's "Dick" to "Doug"; as Mr. Werner put it, "[t]here were several points that came very close to home, to reality, and that in turn threatened Mrs. Caelwaerts" (24:40-41). He called Douglas to his office, where Douglas said that he had not intended any harm and

that his story was not meant as a threat to Mrs. Caelwaerts (24:33).

On November 19, 1998, a delinquency petition was filed in Oconto County Circuit Court alleging that Douglas violated Wis. Stat. § 947.01, the disorderly conduct statute (1:1-2). Douglas filed a motion to dismiss the petition, asserting that the petition failed to state probable cause and that his speech was protected by the First Amendment (18:1-2).

The court denied that motion at the outset of the fact-finding hearing (24:9-10). After hearing testimony from Mrs. Caelwaerts, Mr. Warner, Douglas, and an Oconto County juvenile court worker, the court found that Douglas had committed an act of disorderly conduct (24:79; Pet-Ap. 111). The court found that Douglas had engaged in abusive conduct by presenting the essay to Mrs. Caelwaerts, whom the court found to be the "Mrs. C" referred to in the essay (24:76-77; Pet-Ap. 108-09). It found that "[t]here is no question" that Douglas's paper constituted a "direct threat" to Mrs. Caelwaerts (24:79; Pet-Ap. 111). It further found that there was "absolutely no social value" in a writing that makes a "direct threat" to a teacher (24:78; Pet-Ap. 110). The court also found that Douglas's conduct caused a disturbance because Mrs. Caelwaerts became very upset upon reading the essay (24:78; Pet-Ap. 110). The court held that because Douglas made a "direct threat to his teacher," his actions were not protected by the First Amendment (24:78-79; Pet-Ap. 110-11).

The circuit court adjudicated Douglas delinquent for violating the disorderly conduct statute (24:79; 29; Pet-Ap. 111). It placed him on formal supervision for one year with several conditions, including a daily 9:00 p.m. curfew and a requirement that he write a letter of apology to Mrs. Caelwaerts (27:11-13; 29:1-3).

The court of appeals affirmed. *State v. Douglas D.*, No. 99-1767-FT (Ct. App. Dec. 14, 1999) (Pet-Ap. 101-

07). The court held that Douglas's writing fell within a "category of speech that is not protected by the First Amendment, namely, true threats" (Pet-Ap. 105). The court of appeals rejected Douglas's argument that the disorderly conduct statute could not be applied to pure speech, holding that the "conduct" covered by the statute is not confined to physically disorderly acts but includes both physical acts and unprotected words (Pet-Ap. 106).

The court of appeals noted that Douglas had not challenged the trial court's factual findings as clearly erroneous, and held that any such challenge would have been unsuccessful:

> Douglas attempts to characterize his story as "a third-person story describing a violent act [written] as a creative writing assignment." He does not, however, advance an argument that the circuit court's finding was clearly erroneous. Nor could he. The writing was composed after Douglas had been disciplined in front of his classmates for disruptive behavior and conveys the message that if "Mrs. C" were to admonish him again, she should be prepared to defend herself from harm. ("The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.") Similarly, Douglas does not condemn as clearly erroneous the trial court's implicit finding that the threat was of a nature that would tend to cause a disturbance.

(Pet-Ap. 103 n.3.)

The court of appeals concluded that Douglas's writing assignment was not constitutionally protected and that unprotected speech may be punished under the disorderly conduct statute (Pet-Ap. 107). Accordingly, the court held that "Douglas was subject to a delinquency prosecution based solely on the threat his writing conveyed" (*id.*).

ARGUMENT

I. DOUGLAS'S THREAT TO HARM HIS TEACHER WAS NOT PROTECTED BY THE FIRST AMENDMENT.

A. The First Amendment does not protect threats to harm another person.

The First Amendment's guarantee of freedom of speech prevents states from punishing "the use of words or language not within 'narrowly limited classes of speech.'" *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)). Among the categories of speech that do not receive First Amendment protection are obscenity and fighting words, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992), and the category of speech at issue in this case, true threats.

It is well established that threats to harm another person are unprotected by the First Amendment. *See Watts v. United States*, 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech."); *Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 371 (9th Cir. 1996); *United States v. Fulmer*, 108 F.3d 1486, 1492-93 (1st Cir. 1997); *United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993); *People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999). Threats of violence fall outside the First Amendment because of the compelling societal need to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. Although threats are often conveyed by words and are undeniably expressive in their content, they nevertheless do not merit constitutional protection.

> A threat is made when the threatener informs the recipient of his threat that he is contemplating the infliction of some harm upon

> another, often the recipient himself. Either words or symbols may be the medium of a threat; as anyone familiar with our nation's history is aware, a burning cross is no less effective at communicating the intended message than are written or spoken words. Although threats have undeniable expressive content (indeed, speech qualifies as a threat by virtue of the message it expresses), the First Amendment poses no special obstacle to their prohibition. Threats interfere with the rights of individuals to be free from the fear of violence; they are disruptive and costly to society; and they usually contribute little or nothing to the marketplace of ideas.

United States v. Hayward, 6 F.3d 1241, 1258 (7th Cir. 1993) (Flaum, J., concurring).

To ensure that individuals are not punished for constitutionally protected speech, courts have required that the defendant's statement constitute a "true threat." *See Lovell*, 90 F.3d at 372; *Baer*, 973 P.2d at 1231. A "true threat" is a serious threat to injure another, as distinguished from political argument, idle or innocuous talk, hyperbole or jest. *See United States v. Viefhaus*, 168 F.3d 392, 395 (10th Cir. 1999); *United States v. Spruill*, 118 F.3d 221, 228 (4th Cir. 1997); *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997).

The determination of whether a statement constitutes a true threat is made by considering the entire factual context, including the surrounding events and the reaction of the listeners. *See Lovell*, 90 F.3d at 372. The absence of explicitly threatening language does not preclude the finding of a true threat. *See United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994). Nor does the fact that the threat is conditional preclude that finding. *See id.* As the Seventh Circuit has explained: "Most threats are conditional; they are designed to accomplish something; the threatener hopes that they *will* accomplish it, so that he won't have to carry out the threats." *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990) (emphasis in original).

It is not necessary that the government prove that the defendant had the ability to or intended to carry out the threat. *See Miller*, 115 F.3d at 363; *United States v. Hoffman*, 806 F.2d 703, 707-08 (7th Cir. 1986). "'The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense.'" *Bellrichard*, 994 F.2d at 1324 (quoting *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991)).[1]

The test for determining whether a statement is a true threat is an objective one. *See Miller*, 115 F.3d at 363; *Lovell*, 90 F.3d at 372; *Malik*, 16 F.3d at 49; *Bellrichard*, 994 F.2d at 1323-24; *Baer*, 973 P.2d at 1233. "A 'true threat' is a statement that an ordinary, reasonable person, familiar with the context in which the statement was made, would interpret as a threat." *State v. Milner*, 571 N.W.2d 7, 13 (Iowa 1997); *see also, Miller*, 115 F.3d at 363 ("if a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious expression of intent to harm . . ., that message conveys a 'true threat'").

The use of an objective "reasonable person" standard in determining whether a statement is a true threat avoids the risk of punishing an otherwise innocuous statement merely because it was directed at an unusually sensitive listener. *See Baer*, 973 P.2d at 1233-34. That approach is consistent with Wisconsin's disorderly conduct statute, which does not punish conduct that is tolerated by the community at large but which may disturb the hypersensitive. *See infra*, pp. 18-19.

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[1]Indeed, there are numerous reported cases in which the defendant was found to have made a true threat notwithstanding the fact that he made the threat while serving a lengthy prison sentence. *See, e.g., Miller*, 115 F.3d at 363; *United States v. Maisonet*, 484 F.2d 1356, 1357 (4th Cir. 1973); *Pendergast v. State*, 636 A.2d 18, 19-22 (Md. Ct. Spec. App. 1994).

Douglas does not dispute the general proposition that the constitution does not protect true threats. *See* petitioner's brief-in-chief at 7-11. He argues that his speech was protected because he was writing a literary essay. While literary essays no doubt are protected speech as an abstract proposition, the fact that a specific threat accompanies protected speech does not shield a defendant from culpability. *See Viefhaus*, 168 F.3d at 396. If Douglas's writing contained a true threat against his teacher, as the trial court found that it did, it does not matter that the threat was contained in an otherwise protected creative writing assignment.

B. The trial court's finding that Douglas's writing was a true threat is not clearly erroneous.

Whether a defendant's statement constitutes a true threat is a question for the trier of fact. *See Viefhaus*, 168 F.3d at 397; *Miller*, 115 F.3d at 364; *Malik*, 16 F.3d at 49; *Schneider*, 910 F.2d at 1570. If the defendant's statement is ambiguous, it is for the finder of fact to determine whether that statement represented a true threat. *See Malik*, 16 F.3d at 50; *Schneider*, 910 F.2d at 1570. The fact-finder's determinations in this regard are reviewed under the deferential appellate standards applied to findings of fact. *See, e.g., Malik*, 16 F.3d at 49; *Hoffman*, 806 F.2d at 708; *Pendergast*, 636 A.2d at 21.

In this case, the trial court acted as the finder of fact (24:76-79; Pet-Ap. 108-11). It found that there was "no other way that I can view" Douglas's writing than "as a direct threat to his teacher, Mrs. Caelwaerts" (24:79; Pet-Ap. 111). There was "no question," the court emphasized, that this was a "direct threat to the teacher" (*id.*).

An appellate court will not upset a trial court's findings of fact unless they are clearly erroneous *See State v. Secrist*, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999). Douglas did not argue in the court of appeals that the trial court's finding that he made a "direct threat" was

clearly erroneous, *see* Pet-Ap. at 105 n.5, nor does he make that argument in this court. Rather, he implicitly invites the court to review the question *de novo*. See petitioner's brief-in-chief at 11-14.

Applying the correct standard of review, this court should conclude that the circuit court's finding that Douglas made a true or direct threat to his teacher was not clearly erroneous.[2] The court properly considered all the surrounding circumstances when it made its finding. It noted that Douglas had been disciplined by his teacher, Mrs. Caelwaerts, who sent him into the hall after he disrupted class (24:79; Pet-Ap. 111). When he returned to class, Douglas gave Mrs. Caelwaerts, who was known to the class as "Mrs. C," an essay in which a student named "Dick" attacked his teacher, "Mrs. C," after "Mrs. C" disciplined "Dick" by kicking him out of class (24:77; Pet-Ap. 109).

Both Mrs. Caelwaerts and the assistant principal, Mr. Werner, considered the writing to be a threat (24:15, 34). Mrs. Caelwaerts said that she "[c]an't forget words like this. He wrote that he was going to cut my head off with a machete" (24:15). Mr. Werner was struck by the parallels between Douglas's story and what had just transpired between Mrs. Caelwaerts and Douglas (24:40-41).

Mrs. Caelwaerts' panicked reaction upon reading Douglas's essay, together with Mr. Werner's conclusion that Douglas had threatened the teaching staff, is

[2]The court of appeals correctly concluded that there is no material difference between the circuit court's terminology, "direct threat," and the more commonly used phrase "true threat," *see* Pet-Ap. 105 n.5, as those terms are use interchangeably. *See, e.g., Bellrichard*, 994 F.2d at 1322 ("The First Amendment affords no protection to those who utter direct threats of force and violence toward other persons."). Douglas does not contend that the circuit court's finding that he made a "direct threat" is not equivalent to a finding that he made a "true threat."

compelling evidence that Douglas's writing was a true threat. As the Seventh Circuit explained when it held that the trial court properly admitted the testimony of the victim (a state court judge) about his reaction to a threatening letter, "The fact that the victim acts as if he believed the threat is evidence that he did believe it, and the fact that he believed it is evidence that it could reasonably be believed and therefore that it *is* a threat." *Schneider*, 910 F.2d at 1571 (emphasis in original). The court added that the "high level of violence in this country, some of it directed against public officials, warrants juries in taking such threats deadly seriously." *Id.*

The same concern applies with equal force to a threat against a school teacher. There is nothing in the record to suggest that Mrs. Caelwaerts and Mr. Werner reacted unreasonably when they concluded that Douglas's statement was a serious threat.

That school officials are entitled to take students' threats seriously is illustrated by the Ninth Circuit's recent decision in *Lovell v. Poway Unified School Dist., supra.* *Lovell* was a civil action brought by a 15 year-old tenth-grade student after she had been suspended for threatening a guidance counselor. *Lovell*, 90 F.3d at 369. According to the guidance counselor, the student became extremely upset after the counselor told her that her class schedule could not be changed; she reacted by telling the counselor, "'If you don't give me this schedule change, I'm going to shoot you.'" *Id.* The Ninth Circuit held that a reasonable person in those circumstances would have foreseen that the guidance counselor would interpret the statement as a serious expression of intent to do harm. *Id.* at 372. The court said that the statement was unequivocal and specific enough to convey a true threat of physical violence. *Id.* "This is particularly true," the court observed, "when

considered against the backdrop of increasing violence among school children today." *Id.*[3]

As the court of appeals observed in this case, Douglas's essay sent a specific, threatening message to "Mrs. C" after she had disciplined him in front of his classmates for disruptive behavior that if she were to admonish him again, she should be prepared to defend herself from harm (Pet-Ap. 103 n.3). As was the case in *Lovell*, that statement was "unequivocal and specific enough to convey a true threat of physical violence." *Lovell*, 90 F.3d at 372.

Defense counsel argued at the close of the state's case that Douglas's essay was meant to be humorous (24:50), an argument that Douglas advances in this court as well. *See* petitioner's brief-in-chief at 13. The trial court, like Mrs. Caelwaerts and Mr. Werner, failed to see the humor.

That Douglas's threat was made in the context of a creative writing assignment was certainly one of many relevant facts to be considered by the trial court. But the trial court was entitled to give greater weight to the fact that Douglas gave the essay directly to Mrs. Caelwaerts, rather than, for example, publishing his effort in the school literary magazine. A statement delivered directly to the subject of the threat is more likely to be taken as

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[3]The student disputed the counselor's account of her statement, asserting that she had said under her breath, "I'm so angry I could just shoot someone." *Lovell*, 90 F.3d at 369 n.1, 373. The trial court found that the evidence as to which statement the student actually made to be in equipoise. *See id.* at 373.

The court of appeals held that it was a "closer question" whether the student's version of the statement would constitute a true threat because it is not clear that one should foresee that such a statement would be interpreted as a serious expression of intent to harm. *See id.* The court found it unnecessary to answer the question because the student failed to carry her burden, as the plaintiff in a civil action, of proving that her version was correct. *See id.*

threat by the recipient than is a statement made to the general public, *see Bellrichard*, 994 F.2d at 1321, and that is certainly how Mrs. Caelwaerts understood Douglas's writing.

The central factual question in determining whether a statement is a true threat is "whether those who hear or read the threat reasonably consider that an actual threat has been made." *See Viefhaus*, 168 F.3d at 395-96 (emphasis omitted). Taking into account all of the surrounding facts, including the parallels between the events in the story and the events in the classroom minutes earlier, the trial court's conclusion that this was a true threat rather than imaginative fiction was not clearly erroneous.

Citing a Ninth Circuit case, Douglas argues the state must prove that he acted with the specific intent to intimidate Mrs. Caelwaerts. *See* petitioner's brief-in-chief at 12 (citing *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987)). As the Second Circuit has pointed out recently, every circuit to have addressed the question other than the Ninth has concluded that the government does not have to prove that the speaker knew or intended his communication to be threatening. *See United States v. Francis*, 164 F.3d 120, 121-22 (2d Cir. 1999). All that is required is that the defendant intended to make the statement found to be a threat. *See United States v. Schneider*, 910 F.2d at 1570. There is no question here that Douglas intended to write the essay.

Douglas was not convicted of disorderly conduct simply for using offensive language in his essay. Though he called "Mrs. C" an "old ugly woman" and "a mean old woman that would beat children sencless [sic]," that is not why he was adjudicated delinquent. He made a not very thinly veiled threat to attack "Mrs. C" with a concealed weapon because she had disciplined him. Nothing in the constitution requires the state to allow Douglas to make such a threat without facing the consequences of his act.

C. The disorderly conduct statute does not burden the exercise of First Amendment rights.

Douglas also argues his threat cannot be punished under the disorderly conduct statute because that statute is not narrowly drawn to serve a compelling state interest. *See* petitioner's brief-in-chief at 8. Laws that impose a content-based regulation on *protected* expression must indeed satisfy such strict scrutiny. *See R.A.V.*, 505 U.S. at 403 (White, J., concurring). The disorderly conduct statute is not subject to a strict scrutiny analysis because, as the statute has been construed by this court, it does not regulate protected expression. *See State v. Werstein*, 60 Wis. 2d 668, 673-77, 211 N.W.2d 437 (1973); *State v. Maker*, 48 Wis. 2d 612, 614-15, 180 N.W.2d 707 (1970); *State v. Zwicker*, 41 Wis. 2d 497, 507-11, 164 N.W.2d 512 (1969); *see infra* pp. 19-20. Indeed, state and federal courts have consistently rejected constitutional challenges to the disorderly conduct statute based on arguments that the statute is overbroad; they also have rejected claims that the statute is unconstitutionally vague.[4]

The First Amendment does not limit a state's ability to proscribe true threats under a disorderly conduct statute that does not apply to protected expression. Accordingly, the trial court and the court of appeals correctly held that Douglas's delinquency adjudication did not offend the constitution.

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[4]*See Zwicker v. Boll*, 270 F. Supp. 131, 134-36 (W.D. Wis. 1967), *aff'd per curiam*, 391 U.S. 353 (1968) (vagueness and overbreadth); *Soglin v. Kauffman*, 286 F. Supp. 851, 855 (W.D. Wis. 1968) (same); *City of Oak Creek v. King*, 148 Wis. 2d 532, 546-48, 436 N.W.2d 285 (1989) (vagueness); *State v. Maker*, 48 Wis. 2d at 614-15 (overbreadth); *State v. Zwicker*, 41 Wis. 2d at 507-11 (overbreadth and vagueness); *State v. Givens*, 28 Wis. 2d 109, 115-17, 135 N.W.2d 780 (1965) (vagueness); *State v. Olsen*, 99 Wis. 2d 572, 583, 299 Wis.2d 632 (Ct. App. 1980) (overbreadth).

II. THE DISORDERLY CONDUCT STATUTE PROHIBITS THREATS THAT TEND TO PROVOKE A DISTURBANCE.

Douglas mounts two statutory challenges to his delinquency adjudication. First, he argues that that the disorderly conduct statute does not apply to speech unless that speech is combined with some disorderly physical action that is likely to cause a disturbance. *See* Petitioner's brief-in-chief at 16. Second, he contends that because his threat merely caused personal discomfort on the part of his teacher, it was not conduct that tended to cause a disturbance. *See id.* at 21-22. Applying established principles of disorderly conduct law, the court of appeals correctly rejected those arguments.

A. The statute applies to disorderly conduct committed by words as well as by physical acts.

This court first addressed the scope of the disorderly conduct statute 50 years ago in *Teske v. State*, 256 Wis. 440, 41 N.W.2d 642 (1950). The defendants in *Teske* were labor picketers who had been convicted of disorderly conduct after blocking a train and engaging in a shoving match with police officers. *Id.* at 443. In an argument that is the reverse of that advanced by Douglas, they asserted that the disorderly conduct statute applied only to offensive language and not to conduct. *Id.* at 444. This court rejected that argument, holding that the statute applied to both words and acts:

> "While it is impossible to state with accuracy just what may be considered in law as amounting to disorderly conduct, the term is usually held to embrace all such acts and conduct as are of a nature to corrupt the public morals or to outrage the

> sense of public decency, *whether committed by words or acts."*

Teske v. State, 256 Wis. at 444 (quoted source omitted; emphasis in the original).[5]

The *Teske* decision construed the 1949 version of the disorderly conduct statute, Wis. Stat. § 348.35 (1949).[6] The statute was revised and renumbered in 1953 and again in 1955. *See* William A. Platz, *The Criminal Code*, 1956 Wis. L. Rev. 350, 381. Its core meaning has not changed, however. In *State v. Givens*, 28 Wis. 2d 109, 135 N.W.2d 780 (1965), the court quoted with approval the definition of disorderly conduct contained in *Teske* in construing Wis. Stat. § 947.01 (1963). *See Givens*, 28 Wis. 2d at 116. In its most recent discussion of the scope of the disorderly conduct statute, this court again quoted the *Teske* definition. *See City of Oak Creek v. King*, 148 Wis.

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[5]Douglas argues that this statement is dictum with regard to whether words alone are covered by the disorderly conduct statute. "'[W]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *Gillen v. City of Neenah*, 219 Wis. 2d 806, 825 n.11, 580 N.W.2d 628 (1998) (quoting *Chase v. American Cartage Co.*, 176 Wis. 235, 238, 186 N.W. 598 (1922)). The issue in *Teske* was the scope of the disorderly conduct statute. The court's holding that the statute encompassed both words and physical acts was very much germane to that issue.

[6]The 1949 disorderly conduct statute provided:

> Any person who shall engage in any violent, abusive, loud, boisterous, vulgar, lewd, wanton, obscene, or otherwise disorderly conduct tending to create or provoke a breach of the peace or to disturb or annoy others, whether in a public or a private place, shall be punished by a fine of not more than $100 or imprisonment not over 30 days. . . .

Wis. Stat. § 348.35 (1949); *see Teske*, 255 Wis. at 444.

2d 532, 541, 436 N.W.2d 285 (1989) (interpreting municipal ordinance adopting Wis. Stat. § 947.01).

The *Teske* definition, as reaffirmed in *Givens* and *King*, is used in the current pattern jury instruction for disorderly conduct.[7] The jury instruction states that disorderly conduct has two elements: first, that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct; and second, that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance. *See* Wis. JI-Criminal 1900, at 1 (1999); R-Ap. 102. Citing *Teske*, the jury instruction states that the first element of the offense "may include physical acts or language or both." *Id.* at 1, 3 n.1 (footnote omitted); R-Ap. 102, 104. The instruction continues with this language derived from *Teske* and *Givens*:

> The general phrase "disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance. It includes all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, *whether committed by words or acts.* Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.

Id. at 1 (emphasis added; brackets and footnotes omitted); R-Ap. 102.

Application of the disorderly conduct statute to both physical acts and words is consistent with the purpose of the statute, which is to protect individuals from "substantial intrusions which offend the normal

[7]While pattern jury instructions are not binding authority, they are persuasive authority to which this court has looked for guidance when construing statutes. *See, e.g., State v. Olson*, 175 Wis. 2d 628, 642 n.10, 498 N.W.2d 661 (1993).

sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons." *State v. Zwicker*, 41 Wis. 2d 497, 508, 164 N.W.2d 512 (1969). That purpose was discussed at length in a 1953 report of the legislative council's judiciary committee:

> "The crime of disorderly conduct is based upon the principle that in an organized society one should so conduct himself as not to unreasonably offend the senses or sensibilities of others in the community. Subsection (1) embodies this principle in a form which is on the one hand sufficiently flexible to permit law enforcement officers to keep order in the community and on the other hand sufficiently definite to prevent abuses in administration. The words 'violent, abusive, indecent, profane, boisterous, unreasonably loud . . . conduct' give certainty to the crime while at the same time being broad in scope. On the other hand, they are not broad enough to take care of every situation generally considered to be disorderly . . . . This is not intended to imply that all conduct which tends to annoy another is disorderly conduct. Only such conduct as unreasonably offends the sense of decency or propriety of the community is included. This is implicit in the phrase 'tends to disturb or annoy others.' The question is not whether a particular person was disturbed or annoyed but whether the conduct was of a kind which tends to disturb or annoy others. The section does not protect the hypersensitive from conduct which generally is tolerated by the community at large.
>
> "The other phase of disorderly conduct under subsection (1) is conduct likely to cause or provoke a disturbance of public order, and what type of conduct is likely to do this is largely a question of fact in each case."

Givens, 28 Wis. 2d at 116 (quoting 5 Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code*, at 208 (1953)).

In *Zwicker*, this court observed that in light of the statute's broad purpose, it was "obvious that the great and

varied number of offenses which come within the category of disorderly conduct defy precise definition in a statute." *Zwicker*, 41 Wis. 2d at 508. Thus, the court observed, the legislature has not "attempt[ed] to enumerate the limitless number of antisocial acts which a person could engage in that would menace, disrupt or destroy public order." *Id.* Rather, the statute proscribes conduct "in terms of results which can reasonably be expected therefrom . . . ." *Id.*

The *Zwicker* court emphasized that the disorderly conduct statute does not criminalize all conduct that may tend to annoy another person, nor does it criminalize conduct that may offend a hypersensitive individual. *Id.* The purpose of the statute is to "proscribe substantial intrusions which offend the normal sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons." *Id.* Accordingly, the court held, only such conduct that "unreasonably offends the sense of decency or propriety of the community" is prohibited by the disorderly conduct statute. *Id.*

A threat to kill or seriously injure another person -- particularly a threat delivered directly to the person who is the subject of the threat -- is a "significantly abusive or disturbing" act to a reasonable person; it is a "substantial intrusion" that "offend[s] the normal sensibilities of average persons." *Id.* It is, therefore, "abusive" or "otherwise disorderly" conduct punishable under the disorderly conduct statute.

Douglas argues that *Zwicker* forbids the criminalization of abusive speech unless the speech is delivered in a manner or intertwined with some physical action that is disorderly and likely to provoke a disturbance. He cites the following passage from *Zwicker* in support of his argument:

> The language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitution. The mere

> propounding of unpopular views will not qualify for conviction. The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, and under circumstances in which such conduct tends to cause or provoke a disturbance. Prohibition of conduct which has this effect does not abridge constitutional liberty.

Zwicker, 41 Wis. 2d at 509 (*cited in* petitioner's brief-in-chief at 16).

That passage does not state that words alone can never constitute disorderly conduct. Rather, the court was construing the statute, consistent with constitutional guarantees of free speech, to require that when the words uttered are constitutionally protected, the disorderly conduct statute may be applied only when the words are spoken in conjunction with physical actions that are themselves disorderly. In this case, however, Douglas's words were not constitutionally protected because they constituted a true threat to his teacher. *See supra*, pp. 9-13. There is no need, therefore, to identify any additional non-verbal conduct on which to base the disorderly conduct charge.

Douglas argues that his "act" was not disorderly because it consisted of "writing a fictional third-person story in a school hallway" and that "[w]riting on a piece of paper is not an abusive or otherwise disorderly act." Petitioner's brief-in-chief at 15. What would constitute disorderly conduct in one set of circumstances might not under some other. *See State v. Maker*, 48 Wis. 2d at 616. Had Douglas thrown his essay in the trash rather than handing it to Mrs. Caelwaerts, only to have it discovered later that day by a curious custodian, he could not have been prosecuted for writing that essay. Douglas was not even adjudicated delinquent simply because he shared his literary efforts with a third party. Had Douglas read his essay to his friends after school under circumstances that made it clear that he was just joking, he would not have

been prosecuted. But that is not what happened here. Douglas gave the essay to his teacher, knowing that she would read it. Douglas was not adjudicated delinquent simply for merely writing a story, but for conveying a threat directly to the target of that threat.[8]

Douglas says that he "cannot imagine" how a "student's compliance with a teacher's request to hand in an assignment can be defined as an abusive or disorderly act." Petitioner's brief-in-chief at 15. Simply turning in a class assignment is not an abusive or disorderly act. Turning in an assignment that contains a serious threat to harm the teacher is.

B. Delivering a threatening writing to a teacher is conduct that tends to cause a disturbance.

The trial court found that it was "obvious" that Douglas's threat "did cause and provoke a disturbance as Mrs. Caelwaerts was very upset at receiving and reading this information" (24:78; Pet-Ap. 110). Douglas contends that Mrs. Caelwaerts' fear upon reading his essay constituted mere "personal discomfort" rather than a "disturbance" proscribed by the disorderly conduct statute. *See* petitioner's brief-in-chief at 21. He bases that argument on an erroneous reading of *State v. Werstein*.

Douglas argues that in *Werstein*, this court "refused to equate personal discomfort or fear with provoking a disturbance of the public order." Petitioner's brief-in-chief at 21. In *Werstein*, the defendants entered an Armed Forces induction center to support another individual who intended to refuse induction that day. *See Werstein*, 60 Wis.2d at 670. The defendants were legally present in the

[8]The state does not suggest that Douglas could be prosecuted only if he made the threat directly to his teacher. If he had told others that he planned to harm his teacher, under circumstances in which they understood the threat to be serious, that too could be punished as disorderly conduct.

building and did not engage in any violent, abusive, indecent, profane, boisterous or unreasonably loud conduct. *See id.* at 671, 676. The defendants were convicted of disorderly conduct after they refused the commanding officer's order to leave the center. *See id.* at 670-71.

The issue on appeal was whether the defendants had engaged in "otherwise disorderly" conduct. *See id.* at 671. The state argued that because the four defendants' presence caused the induction center's personnel to fear for their safety, the conduct was disorderly. *See id.* at 673. The court held that a defendant's peaceful presence, absent any other provocative actions, is not disorderly conduct. *See id.* at 673-74. "Mere presence absent any conduct which tends to cause or provoke a disturbance," the court held, "does not constitute disorderly conduct." *Id.* at 674. The court made it clear, however, that it would not have reached the same conclusion had the defendants done something abusive or "disturbing in the eyes of a reasonable person" rather than simply being peacefully and lawfully present.

> If, however, there had been some additional basis other than the defendants' mere presence upon which the commanding officer based his fear for the [center's] personnel, we would not be moved to such a holding. If the defendants had been violent or in any fashion so disorderly that their demeanor could be deemed abusive or disturbing in the eyes of reasonable persons, a different result would be reached. However, it is uncontroverted that the defendants' conduct was not violent, abusive, indecent, profane, boisterous or unreasonably loud. The defendants were merely present.

Id.

Werstein holds that a defendant's peaceful, lawful presence is not disorderly conduct simply because that presence causes fear in others. It does not hold that conduct that causes apprehension among bystanders or observers can never be disorderly conduct. Had the

defendants in *Werstein* made threatening statements to the induction center's personnel to cause them fear, such as threats to harm the personnel or damage the property, it is doubtful that that the *Werstein* court would have reached the same conclusion.

Moreover, whether an actual disturbance resulted from Douglas's giving a threatening note to his teacher is not the dispositive issue under the disorderly conduct statute. As this court has explained:

> It is not necessary that an actual disturbance must have resulted from the appellant's conduct. The law only requires that the conduct be of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed.

City of Oak Creek v. King, 148 Wis. 2d at 545.

Given the heightened public attention to the issue of school violence and the many highly publicized reports of fatal attacks on teachers and students in recent years, it is difficult to argue that a student's threat to kill a teacher is not the type of conduct that would tend to provoke a disturbance.[9] In the three-year period from February, 1996, through February, 1999, there were at least 16 highly publicized school shooting incidents in this country. *See* Elissa Haney, *Lesson in Violence: A Timeline of Recent School Shootings* (visited April 14, 2000) <http://www.infoplease.com/spot/schoolviolence1.html>. Eight of those shootings were by 13 or 14 year-old boys. *See id.*

Douglas was 13 years old when he threatened his teacher (1:1). Given the high level of public concern about violent acts in the nation's schools committed by students, especially by adolescent boys, Mrs. Caelwaerts'

[9]As the court of appeals correctly observed, the circuit court's finding that Douglas's threat provoked a disturbance constitutes an "implicit finding that the threat was of a nature that would tend to cause a disturbance" (Pet-Ap. 103 n.3).

fearful reaction upon reading Douglas's threat and the assistant principal's concern about the threats to his staff are precisely the reactions that such a threat could be expected to provoke.

Douglas argues that the court should not be "swayed . . . by exaggerated media reports and public misperceptions about school violence." Petitioner's brief-in-chief at 22. He contends that there were "only" 26 school-associated violent deaths in 1999, that school violence is declining, and that Wisconsin's schools are very safe. *See id.* at 22 -23. One can only hope that he is right and that school violence will continue to decline. But even if he is right, that does not mean that school violence is not a significant problem in this country.

According to a report released last year by the United States Department of Education and United States Department of Justice, students aged 12 through 18 were the victims of about 202,000 serious violent crimes at school in 1997. *See* National Center for Education Statistics and Bureau of Justice Statistics, *Indicators of School Crime and Safety 1999* (Sept. 1999) ("*NCES/BJS Report*") at v, 2.[10] Seven percent of high school students report being threatened or injured with a weapon on school property in 1997, a figure that remained relatively constant over the five-year period from 1993 through 1997. *See id.* at 7.

During that same five-year period, teachers were the victims of 657,000 violent crimes at school. *See id.* at viii, 22. Middle and junior high school teachers were more likely to be victims of violent crimes than high school or elementary school teachers. *See id.* at viii, 22. During the 1993-94 school year (the only year for which the report provides these data), twelve percent of elementary and secondary school teachers were threatened

[10]This report is available online at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=1999057>.

with injury by a student from their school and four percent were physically attacked by a student. *See NCES/BJS Report* at 24.

Even if media reports do create an exaggerated perception of the level of school violence, it cannot be seriously disputed that, given the actual and the perceived level of violence in schools, a student's threat to harm a teacher is an act that would tend to cause or provoke a disturbance.

Douglas also argues that an act that disturbs a single individual can never violate the disorderly conduct statute because the act does not disturb the public order. *See* petitioner's brief-in-chief at 21-22. When the act consists of a threat made in the school to a teacher who is attempting to carry out her public duties in a public setting, that act necessarily affects the public order. Moreover, this court has rejected the contention that abusive language directed at one individual cannot be disorderly conduct if the speech is not overheard by others. In *Lane v. Collins*, 29 Wis. 2d 66, 138 N.W.2d 264 (1965), a civil case in which a person arrested sued the arresting officer for false imprisonment, the court stated that "[t]he fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation of [a disorderly conduct] statute or ordinance." *Id.* at 72; *see also* Comment to Wis. JI-Criminal 1900 at 3 (discussing *Lane*); R-Ap. 104.

Delivering a threat to a teacher at school is abusive or otherwise disorderly conduct that tends to provoke a disturbance. The trial court's finding that Douglas engaged in disorderly conduct when he handed a written threat to his teacher was not clearly erroneous.

CONCLUSION

The court of appeals correctly concluded that Douglas D.'s threat was not constitutionally protected and that his unprotected speech may be punished under the disorderly conduct statute. For the reasons stated above, the court should affirm the court of appeals' decision affirming the trial court's judgment adjudicating Douglas D. delinquent for violating the disorderly conduct statute.

Dated this 20th day of April, 2000.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 7,682 words.

Jeffrey J. Kassel

INDEX TO APPENDIX OF PETITIONER-RESPONDENT

RECEIVED

Doug D[redacted] -6

There one lived an old ugly woman her name was Mrs. C that stood for crab. She was a mean old woman that would beat childen senceless. I guess thats whey she became a teacher.

Well one day she kick a student out of her class + he dint like it. That student was named Dick.

The next morning Dick came to class + in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out + cut her head off.

When the sub came 2 days later she needed a papeclipp so she opened the door. Ahh she screamed as she found Mrs. C's head in the door.

PETITIONER'S EXHIBIT #1 3-11-99

FILED MONA M. KIELISKZEWSKI MAR 11 1999 IN PROBATE OCONTO COUNTY, WI

1900 DISORDERLY CONDUCT — § 947.01

Disorderly conduct, as defined in § 947.01 of the Criminal Code of Wisconsin, is committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

First, that the defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.

Second, that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

The first element of this offense requires that the defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct. This element of the offense may include physical acts or language or both.[1]

[The general phrase "disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[2] It includes all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.][3]

 (Rel. No. 37—4/99)

The principle upon which this offense is based is that in an organized society one should so conduct himself as not to unreasonably offend the senses or sensibilities of others in the community.[4] This does not mean that all conduct which tends to disturb another is disorderly conduct. Only such conduct as unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct which is generally tolerated by the community at large but which might disturb an oversensitive person.

The second element of this offense requires that the defendant's conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance. It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed.[5] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

If you are satisfied beyond a reasonable doubt that the defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct and that his conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1900 was originally published in 1966. Editorial revisions were made in 1989, 1991, and 1998.

In State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), the court affirmed the convictions of several civil rights demonstrators on the grounds that the defendants' conduct met the requirements of the disorderly conduct statute as to being disruptive of good order and tending to provoke a disturbance and on the additional grounds that each defendant deliberately and knowingly violated commands of persons in authority. In so ruling, the court held that persons in authority over public buildings must be accorded discretion to regulate conduct therein. In appropriate cases, the jury should be instructed on failure to obey lawful commands of persons in authority as constituting disorderly conduct. See note 3, below.

The application of disorderly conduct and related statutes often involves claims that the exercise of constitutional rights prevents such application or excuses what would otherwise be a criminal violation. For recent discussions, see the following: City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989) (disorderly conduct ordinance); State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989) (criminal trespass to medical facility statute); Milwaukee v. K.E., 145 Wis.2d 24, 426 N.W.2d 329 (1988) (juvenile loitering ordinance); Milwaukee v. Nelson, 149 Wis.2d 434, 439 N.W.2d 562 (1989) (adult loitering ordinance); State v. Dronso, 90 Wis.2d 110, 279 N.W.2d 710 (Ct. App. 1979) (§ 947.01). Also see Texas v. Johnson, 109 S. Ct. 2533 (1989), dealing with the federal flag desecration statute.

In State v. Olsen, 99 Wis.2d 572, 299 N.W.2d 632 (Ct. App. 1980), the defendants were charged with disorderly conduct as a result of demonstrations against a shipment of spent fuel from a nuclear power plant. The court of appeals held that the trial court acted properly in excluding evidence offered by the defendant to show that his conduct was privileged under the defense of necessity as set forth in § 939.47. The court held that necessity is limited to the pressure of natural physical forces such as "storms, fires and privations" and therefore is not available in the context of a protest against the transportation of spent nuclear fuel. 99 Wis.2d 572, 576.

1. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].
>
> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

2. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct" which tends to provoke a disturbance means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. Such interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

3. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

4. In State v. Givens, supra, the court quotes this principle as stated in the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953).

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case the defendant has testified that he engaged in the conduct in order to protest the Viet Nam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

5. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 99-1767-FT

In the Interest of Douglas D.,
A Person under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DOUGLAS D.,

Respondent-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A DELINQUENCY ADJUDICATION ENTERED IN THE OCONTO COUNTY CIRCUIT COURT

REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

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STATE OF WISCONSIN

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ARGUMENT

I. ADJUDICATING DOUGLAS DELINQUENT BECAUSE OF THE CONTENT OF HIS *CREATIVE WRITING* ASSIGNMENT, VIOLATED HIS CONSTITUTIONAL RIGHT TO FREE SPEECH.

There is no dispute that Douglas was punished for the content of his creative writing story. Analysis of this case, therefore, begins with the principle that "content

based regulations are presumptively invalid." ***R.A.V. v. City of St. Paul,*** 505 U.S. 377, 382 (1992).

The state argues that "threats" fall outside First Amendment protection. Labeling language a "threat" does not exclude it from First Amendment protection:

> In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. [citation omitted]. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

The first question in this case, therefore, is whether the words of Douglas's creative writing assignment are constitutionally proscribable because of their content, a question of law reviewed *de novo* by this court. ***United States v. Francis***, 164 F. 3d 120, 123, fn. 4 (2nd Cir. 1999).

A. Douglas's Creative Writing Assignment Was Not A "True Threat," Because It Was Not "Unequivocal, Unconditional, Immediate And Specific." Nor Did The State Meet Its Constitutional Burden To Prosecute Under A Statute "Finely Tailored To Serve Substantial State Interests," And To Prove That Douglas Intended His Writing To Intimidate His Teacher.

Since the Supreme Court decision in ***Watts v. United States***, 394 U.S. 705 (1969), courts have struggled

to define the difference between a "true threat" and constitutionally-protected speech. It is "an area of remarkable confusion and inconsistency in First Amendment jurisprudence." Robert Kurman Kelner, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 Va. L.Rev. 287, 288 (1998).

The briefs of both parties illustrate this confusion and inconsistency. In his brief-in-chief, Douglas D. defined a true threat as one which is "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." ***United States v. Kelner***, 534 F. 2d 1029, 1027 (2nd Cir. 1976). Another definition was cited, that a reasonable person would foresee that the recipient would interpret it "as a serious expression of an intention to inflict bodily harm upon or take the life of" another. ***United States v. Hoffman***, 806 F.2d 703, 707 (7th Cir. 1986). To those definitions, the state adds four more, from language in a concurring opinion in ***United States v. Hayward***, 6 F.3d 1241 (7th Cir. 1993), from ***United States v. Viefhaus***, 168 F.3d. 392, 395 (10th Cir. 1999), from ***State v. Milner***, 571 N.W.2d 7 (Iowa, 1997), and from ***United States v. Miller***, 115 F.2d 361, 363 (6th Cir. 1997).

In addition to inconsistencies among definitions of "true threats," there is confusion between the objective inquiry into general intent and the threshold question of whether a true threat was made. *See Kelner, supra*, 84 Va. L. Rev. at 199-300. Additionally, many statutes criminalizing threats require, as an element of the offense, a specific intent to intimidate. While that specific intent has often been relied upon as safeguarding First Amendment rights, courts are divided as to whether it is always a required element. *See Kelner, supra*, 84 Va. L.Rev. at 305-307; ***U.S. v. Frances, supra*** at 122.

However, two themes emerge from a review of "threats" cases cited by both Douglas and the state. First,

every criminal prosecution for a "true threat" cited by either party, has been undertaken under a statute specifically prohibiting threats to another person.[1] Second, every case cited by either party involved direct, expository statements. Not one was set, as was Douglas's, in a fictional context.

1. The disorderly conduct statute is not content-based regulation of speech, so is not finely tailored to serve substantial state interests.

Content-based regulation of speech, in any context, must be "finely tailored to serve substantial state interests, and the justification offered for any distinctions it draws must be carefully scrutinized." ***Carey v. Brown***, 447 U.S. 455, 462-63 (1980), ***Broadrick v. Oklahoma***, 413 U.S. 601, 611-12 (1973).

Just as this principle applies to libel and obscenity, it applies to "true threats." They cannot be constitutionally proscribed unless the controlling laws are "narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." ***U.S. v. Gilbert***, 813 F.2d 1523, 1529 (9th Cir. 1987).

Wisconsin's disorderly conduct statute is not narrowly drawn with regard to content—it is very broad. In fact, it is a "time, place, and manner" regulation, not a content regulation. Therefore, it does not "represent a considered legislative judgment" that the content of Douglas's creative writing assignment "has to give way to other compelling needs of society."

Not only does Douglas's prosecution under the disorderly conduct statute violate the principle that

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[1] ***Lovell v. Poway United School District***, 90 F.2d 367 (9th Cir. 1996) is the sole exception—that case did not involve a criminal prosecution, but rather a school suspension.

content-based regulation must be specifically and narrowly drawn, it ***directly contradicts*** the considered legislative judgment about regulation of threats in this context. Wisconsin has enacted content-based statutes prohibiting threats, representing a considered legislative judgment that their content has to give way to the compelling needs of society, in specific instances. Wisconsin Statute § 947.013, under which Douglas might have been petitioned as delinquent, prohibits threats to cause physical injury, but only if it is done "with intent to harass or intimidate another person."[2]

Therefore, Douglas's prosecution for the content of his story under the disorderly conduct statute actually ***contradicts*** the legislature's considered judgment that specific intent to harass or intimidate is a necessary element of content based regulation of threats in this instance.

2. Douglas's attempt to write a creative, fictional story, does not fall within a category of speech which is constitutionally proscribable.

Courts have determined that in a few limited areas, First Amendment protection of free speech must give way to restrictions on content, because some speech is considered to be "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 572 (1942), quoted in ***R.A.V. v. City of St. Paul, supra*** at 383.

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[2] Other statutes prohibit threats in specific instances not applicable to this case, such as threats to witnesses, judges, and department of revenue, commerce and workforce development employes, under Wis. Stat. §§ 940.201, 940.203 and 940.207

If this court determines that Wisconsin's disorderly conduct statute can ***ever*** be applied to the content of written speech, it must then determine whether, in this context, Douglas's fictional story was "of such slight social value" that the benefit of its writing was "clearly outweighed by the social interest in order and morality."

Douglas's fictional story is of great social value, because it was an honest attempt by a student to complete a school assignment. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . ." ***Sweezy v. New Hampshire***, 354 U.S. 234, 250 (1957). A child who is punished for making a mistake of judgment in school, learns not to take creative risks for fear of error, and the educational process stops.

For this reason, Douglas's writing is entitled to respect at least as great as political speech, like that protected as "political hyperbole" in ***Watts v. United States, supra***. Even crude attempts to complete a creative writing assignment must be protected to "avoid the chilling effect that inexorably produces a silence born of fear." ***Thomas v. Board of Education, Granville Central School District***, 607 F.2d 1043, 1047 (2nd Cir. 1979).

Additionally, although the state correctly points out that the determination of whether a statement constitutes a true threat must consider the entire factual context, the state discounts the most important contextual element in this case. Douglas's "statement" was a fictional story. Douglas's teacher asked for fiction, identifying her assignment as creative writing. She invited the use of imagination and fantasy, by titling it "Top Secret."

Although the state's brief cites many "threats" cases, it does not cite one in which the alleged threat was part of a fictional story. Every case cited by the state involved a direct, non-fictional contact, through letter,

telephone or in person, threatening bodily harm. Recently, the federal government initially indicted a defendant for the content of a "short story" posted on the internet, but later admitted that the short story did not constitute a threat, and changed the indictment to focus on e-mail communications. ***Kelner, supra***, 84 Va. L.Rev. at 307-08, discussing ***United States v. Baker***, 890 F. Supp. 1375 (E.D. Mich. 1995), aff'd 104 F.3d 1492 (6th Cir. 1997).

Additionally, while the state relies heavily upon the initial reaction of the teacher and other school officials, it discounts Douglas's consistent denials of intent to harm his teacher, his apology to her, and his return to school after its investigation into his intentions. Douglas had been back in school, with the permission of school officials, for more than a month before the delinquency petition was filed.

Douglas's creative writing assignment was entitled to First Amendment protection because it had great social value, and because it was not an "unequivocal, unconditional, immediate and specific" threat to harm another. His adjudication of delinquency, based on the content of his story, violates his Constitutional free speech rights.

B. The Trial Court's "Finding" That Douglas's Story Was A Threat Not Entitled To First Amendment Protection, Is A Conclusion Of Law, Not Fact. It Is To Be Reviewed Independently By The Appellate Court.

The state erroneously argues that the trial judge's statement that Douglas's fictional story was a direct threat to his teacher, is a finding of fact, to be reviewed under the misuse of discretion standard.

Whether Douglas's writing was entitled to First Amendment protection is a constitutional question. "[T]he appellate court independently determines the questions of 'constitutional' fact. [citation omitted]. These questions are not questions of evidentiary or historical fact, but are rather questions that require 'application of constitutional principles to the facts as found. . . .' [citation omitted]". ***State v. Woods***, 117 Wis. 2d 701, 715-16, 345 N.W.2d 457 (1984).

In this case, there was little dispute as to historical or evidentiary fact, and the trial court did not make erroneous findings. The first question presented in this case, however, is a constitutional one: could Douglas's story be prosecuted under Wis. Stat. § 947.01, without violating his First Amendment rights? Under well-settled principles of law, that question is reviewed *de novo* by the appellate court. ***State v. Woods, Id.***.

The state's confusion on this point apparently stems from the fact that every "threats" case cited by both parties was prosecuted under a specific "threats" statute. Therefore, one of the elements of the offense—whether a reasonable person would interpret the communication as a true threat—is similar, but not the same as, the constitutional question. The court specifically addressed this issue in ***United States v. Francis***, 164 F.3d. 120, 123 (fn.4) (2nd Cir. 1999), saying:

> We have routinely used the term "true threat" in setting forth the second element of the crime. *See, e.g., Sovie*, 122 F.3d at 125. While we continue to do so, we note that the question of whether a defendant's communication is a true threat rather than speech protected by the First Amendment—a threshold question of law for the court, *see Kelner*, 534 F.2d at 1025 (whether statement is true threat rather than "mere political hyperbole" is a question of law)—is different from the question of whether a reasonable person would interpret the communication as a true threat—a question for the jury at trial, *see Malik*; 16 F.3d at 49.

In this case, the trial court fact-finder was not presented with a question whether, as an element of the offense, Douglas's writing was reasonably interpreted as a true threat to his teacher. Therefore, its finding was a constitutional one, which is reviewed *de novo* by this court.

II. WISCONSIN'S DISORDERLY CONDUCT LAW DOES NOT CRIMINALIZE THE CONTENT OF A SCHOOL CREATIVE WRITING ASSIGNMENT.

A. Wisconsin's Disorderly Conduct Statute Does Not Criminalize Abusive Speech, Unless The Speech Is Intertwined With Actions That Are Both Disorderly And Likely To Cause A Disturbance.

Content-based regulation of speech is presumptively invalid, but is permissible in some circumstances, as discussed above.

Another type of regulation of speech is "time, place or manner" restrictions that are "justified without reference to the content of the regulated speech." ***R.A.V. v. City of St. Paul, supra,*** at 386.

> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

Id. at 385.

Wisconsin's disorderly conduct statute is a "time, place or manner," regulation, and its meaning must be understood in that context. As the court noted in ***State v. Zwicker***, 41 Wis. 2d 497, 510, 164 N.W.2d 512 (1969), "general regulatory statutes, not intended to control the

content of speech but incidentally limiting its unfettered exercise" are Constitutionally permissible if properly drawn. Therefore, the courts "have upheld reasonable 'time, place or manner' restrictions, ***but only if*** they are 'justified without reference to the content of the regulated speech.'" ***R.A.V., supra***, at 386 (emphasis added).

As discussed in both parties' briefs, the ***Zwicker*** court therefore limited the reach of the disorderly conduct's prohibitions to activities "carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud or conduct similar thereto." ***Id.*** at 509.

The state argues that disorderly conduct may apply to language, and Douglas agrees—if that language is intertwined with disorderly activities. For example, language shouted through microphones and sound trucks late at night in residential neighborhoods, might be regulated as disorderly conduct, because it is unreasonably loud, therefore regulation is "justified without reference the content" of the language. ***R.A.V., supra***, at 386.

In this case, the application of the disorderly conduct statute to Douglas's written story is justified ***solely*** on the content of his writing. There was no intertwined disorderly activity. Therefore, the disorderly conduct statute, as a "time, place or manner" regulation, cannot be constitutionally applied to the content of Douglas's story.

B. Wisconsin's Disorderly Conduct Law Proscribes Conduct Likely To Provoke A Disturbance To The Public Order, Not Personal Discomfort.

The state apparently accepts Douglas's point that the state must prove conduct tending to cause a

disturbance of public order, not simply personal discomfort, to prove disorderly conduct.

Rather, the state argues that Douglas's conduct did tend to disturb public order, citing "the high level of public concern about violent acts in the nation's schools." Additionally, the state cites the court of appeals as "correctly" observing that the circuit court's finding that Douglas's "threat" provoked a disturbance was an "implicit finding that the threat was of a nature that would tend to cause a disturbance" (State's Brief, p. 23, note 9).

The trial court made no finding, explicit or implicit, that Douglas's writing tended to cause a disturbance of public order. The trial court's finding was one of personal discomfort: "It's obvious here that it did cause and provoke a disturbance as Mrs. Caelwaerts was very upset at receiving and reading this information." (24:78; App. 110). The trial court's finding that personal discomfort satisfied the second element of the offense of disorderly conduct, was an erroneous legal conclusion.

While he wishes to refrain from engaging in a battle of statistics about safety in public schools, Douglas points out that it is not merely "he" who "contends" that school violence is declining and Wisconsin's schools are very safe (State's Brief, p. 24). Douglas quoted, in his brief, the Wisconsin Departments of Justice and Public Instruction for that information. Their joint Safe Schools Task Force Report concluded: "Research shows that Wisconsin's schools are very safe. . . . . [W]e must understand that school violence, like violence in general, is declining." (Nov. 1999). Surely teachers, and the courts, can accept the accuracy of a report generated by our state's top public schools and law enforcement agencies.

Douglas's fictional story did not cause a disturbance of the public order, and there was no evidence from which to conclude that it was likely to do

so. As would be expected in this context, professional school staff investigated and resolved their questions about Douglas's intentions in an orderly manner.

CONCLUSION

It violated Douglas's Constitutional right to freedom of speech to adjudicate him delinquent for the content of his written, fictional story. It was not a "true threat," and the statute under which he was prosecuted was not "finely tailored to serve substantial state interests."

Wisconsin's disorderly conduct statute, a "time, place or manner," regulation which is constitutionally justifiable only if it is applied without reference to the content of the regulated speech, cannot be the basis for a delinquency adjudication in this case, because Douglas's prosecution is based solely on the content of his writing.

Dated this 9th day of May, 2000.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 2,937 words.

Dated this 9th day of May, 2000.

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STATE OF WISCONSIN
IN THE SUPREME COURT

No. 99-1767-FT

In the interest of Douglas D.,
A Person under the Age of 17,

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DOUGLAS D.,

Respondent-Appellant-Petitioner.

On Review Of A Decision Of the Court of Appeals Affirming
A Judgment Entered In The Oconto County Circuit Court,
The Hon. Richard D. Delforge Presiding

NON-PARTY BRIEF OF JUVENILE LAW CENTER AND NATIONAL CENTER FOR YOUTH LAW IN SUPPORT OF DOUGLAS D.

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Wisconsin Depts. of Justice & Public Instruction, *Wisconsin Safe Schools Task Force Final Report – November 1999,* Madison, WI: Wisconsin Depts. of Justice & Public Instruction (Nov. 1999) n.3

I. INTEREST OF *AMICI*

The Juvenile Law Center ("JLC") is a private, non-profit public interest law firm that has represented children since 1975 in cases involving Pennsylvania's child welfare, juvenile justice, mental health and public health systems. JLC has worked to ensure, *inter alia*, that children's constitutional and statutory rights are rigorously enforced throughout these systems.

The National Center for Youth Law ("NCYL") is a private, non-profit legal organization devoted to improving the lives of poor children in the United States. For more than 25 years, NCYL has provided support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice.

II. SUMMARY OF ARGUMENT[1]

Schools are among the safest places for our children to be. Yet, driven by the *misperception* that school violence is on the rise, school officials, legislators, law enforcement and the courts are increasingly taking on the issue of school safety in a heavy-handed manner. However, punitive measures, administered

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[1] *Amici* adopt the Statement of the Case as set forth in Appellant Douglas D.'s brief.

without judgment or balance, as evidenced in "zero tolerance"[2] policies, criminalize minor transgressions and expose our children to a juvenile justice system ill-suited to deal with youthful indiscretions.

III. ARGUMENT

A. The perception that schools are increasingly violent and that our children and teachers are not safe is a misconception; the evidence shows that schools are among the safest places to be.

"America's schools are among the safest places to be on a day-to-day basis." Richard W. Riley & Janet Reno, Introductory Letter to U.S. Dept. of Educ. & U.S. Dept. of Just., *Early Warning, Timely Response: A Guide to Safe Schools* (Aug. 1998) (<www.ed.gov/officies/OSERS/OSEP/earlywarn.html>) [hereafter "DOE/DOJ, *Early Warning, Timely Response*"]. By virtually every measure, all types of school crimes are declining. School-associated violent deaths in 1998-99 showed a 40 percent decline from the previous year and 26 percent drop from the average for the previous six years. *School Associated Violent Deaths*, Westlake Village, CA: The National School Safety Center (Aug. 1999). Between 1993 and 1997, student reports of physical fights on and off school grounds decreased, as

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2 "Zero-tolerance" refers to those policies that "punish all offenses severely, no matter how minor ...." Russ Skiba & Reece Patterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, at 1 of 12 (Jan. 1999) (<www.pdkintl.org/kappan/kski9901.htm>) [hereafter "Skiba, *Dark Side*"].

did the number of students reported as having brought a gun to school. Nancy D. Brener, et. al., *Recent Trends in Violence Related Behaviors Among High School Students*, 2112 JAMA (1999). During this same period, non-fatal school crimes in general have decreased: reported school crimes decreased 29 percent; serious violent crimes, 34 percent; violent crimes, 27 percent; and thefts, 29 percent. P. Kaufman, et al., *Indicators of School Crime and Safety, 1999,* Washington, DC: U.S. Depts. of Education and Justice (1999). More broadly, there has been a continuing decline in the rate and number of youth arrested for serious offenses. U.S. Dept. of Justice & Fed. Bureau of Invest., *Crime in the United States: Uniform Crime Reports,* Washington, DC: U.S. Dept. of Justice & Fed. Bureau of Investigation (1998, 1993). Juvenile homicide arrests, in particular, have dropped 56 percent from 1993 through 1998. *Id.* All totaled, there has been a 30 percent drop in the total juvenile crime rate. *Id.*[3]

By way of comparison, over 98 percent of the children who die each year from gunfire were shot and killed away from school. Elizabeth Donohue, et al., *School Housing Hype: School Shootings and the Real Risks Kids Face in America,* in Justice Policy Inst., Policy Report 4 (1998). One study, moreover,

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Wisconsin schools reflect these national trends. *See* Wisconsin Depts. of Justice & Public Instruction, *Wisconsin Safe Schools Task Force Final Report – November 1999,* at 4 of 14 Madison, WI: Wisconsin Depts. of Justice & Public Instruction (Nov. 1999) (<www.doj.state.wi.us/ssreport/recom.htm>).

estimated that over 10 percent of U.S. children are victims every year of a "severe violent act" at the hand of their parents, K.A. Dodge, et al., *Mechanisms in the cycle of violence*, 250 Science 1678-83 (Dec. 21, 1990); yet only one in one-thousand (or 0.1 percent of all children) were victimized by serious violent crime at school. U.S. Depts. of Education & Justice, *School Safety: 1999 Annual Report on School Safety* 3-4, Washington, DC: U.S. Depts. of Education & Justice (1999) [hereafter "DOE/DOJ, *1999 Annual Report*"].

These statistics notwithstanding, Americans increasingly perceive our schools as less safe.[4] There is one in two million chance of being killed in schools, yet polls suggest that almost three-quarters of Americans think it is "likely" that a shooting will occur in their schools. Kim Brooks, et. al., *School House Hype: Two Years Later*, Washington, DC: Justice Policy Institute, Covington, KY: Children's Law Center (April 2000) [hereafter "Brooks, *School House Hype*"], at 6, citing to *USA Today/CNN/Gallup Poll Results*, April 21, 1999. There has been a 30 percent drop in youth crime, but almost two-thirds of Americans think it is on the rise. *Id.*, Brooks, *School House Hype*, at 9.

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In this case, the State expressly invokes the recent specter of school shootings. *See* Brief of Petitioner-Respondent, State of Wisconsin, at 23-25. *See also In the Interest of A.S.*,__ N.W.2d __, 2000 WL 233125 (Wis. App. 2000), slip op. at 9 (court observes that juvenile's actions in that case occurred in a context of "extreme violence in our public schools," and that there is "a specter of violence that currently troubles our public schools")

A number of factors may account for this gap between perception and reality. First, although school-associated violent deaths are on the decline, the number of multiple victim homicides has increased, DOE/DOJ, *1999 Annual Report,* at 3, thereby drawing more intense media attention. Another explanation may be due to aggressive surveillance-type efforts to make schools safer. One recent study suggests that "security-focused" schools (i.e., those which emphasized security through metal detectors, locked doors, surveillance, and personal searches), create an "unwelcoming, almost jail-like, heavily scrutinized environment" that make children *feel* less safe. Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools,* 22 Educ. and Treatment of Children (Aug. 1999). Also, violent incidents in suburban schools has made what heretofore was perceived as an urban problem for poor and minority kids a national issue for all parents.

The mass media plays a pivotal role in educating the public about violence in our schools.[5] Understandably, the media has closely covered school shootings. However, media coverage generally has not sought to place those events in perspective. Ira M. Schwartz, *School Bells, Death Knells, and Body Counts: No Apolcalypse Now,* 37 Hous. L. Rev. 1, 4 (2000) [hereafter "Schwartz, *School*

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See Lori Dorfman, et al., *Youth and Violence on Local Television News in California,* 87 Am. J. of Public Health 1311-16 (Aug. 1997).

Bells"]. As a result, the media has "render[ed] Americans more fearful of their kids than they ought to be." Brooks, *School House Hype*, at 31.

B. The misconception about safety in our schools has led schools to deal with even minor transgressions in an increasingly heavy-handed manner, turning our children into criminals.

Misconceptions regarding school violence, bolstered by a few hyper-publicized tragedies, are transforming school safety policies at a local, state and national level. From "profiling" – whereby students are targeted based on a list of characteristics deemed predictive of a tendency toward violence [6] – to beefed up security measures such as metal detectors and video surveillance, to the use of "zero-tolerance" policies, which impose swift and severe sanctions for a variety of behavior, schools nationwide are more and more adopting a bunker mentality.

Although these reactive policies initially addressed gun and drug related offenses, many now target behaviors that ordinarily would be considered minor transgressions. Gone is the day where "the playground scrap or kickball tussle [is] deemed a rite of passage best settled by a teacher who orders the combatants to

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See Francis X. Clines, *Program Spots Dangerous Youths; Columbine Spurs Student Profiling System,* Dayton Daily News, Oct. 24, 1999, at 4A; Andrea Billups, *FBI Teaches Ways to Prevent Violence: Schools Search for Solutions,* The Washington Times, Sept. 19, 1999. One Illinois school's profiling checklist includes "use of abusive language," "cruelty to animals," and "writings reflecting an interest in the 'dark side of life'." Brigette Greenberg, Associated Press, *'Student Profiling' Launched to Combat Violence,* The Capital Times, Sept. 7, 1999.

their corners, hears out the warring sides and demands apologies and a handshake." Dirk Johnson, *Schools Are Cracking Down On Misconduct,* New York Times, Dec. 1, 1999, at A1 [hereafter "Johnson, *Cracking Down*"]. Instead, heavy-handed measures, administered without discretion or judgment, rule the day. From the third-grader who is expelled for twisting the finger of a girl he said was "saying bad thing in line" and getting into a scuffle on the playground during tetherball, Skiba, *Dark Side,* at 6 of 12, to the nine-year-old who is suspended for bringing to school a manicure kit with a one-inch knife, *id.* at 4 of 12, examples of extreme reactions to trivial wrongdoing abound.

One highly publicized incident involved a scenario similar to the present case. Last year, in Denton, Texas, a seventh-grade English class was assigned the task of writing a Halloween horror story. *See* Brenda Rodriguez & Annette Reynolds, *Boy freed after story lands him in cell,* Dallas Morning News, Nov. 3, 1999 (<www.dallasnews.com/metro/1103met999jailboy.htm>). Thirteen-year-old Christopher Beamon completed the assignment and received a perfect grade, plus extra credit for reading his story aloud in class. The story described shooting a teacher and two classmates, all of whom were referred to in the story by name. Concerned that Christopher might cause some harm, the parents of the students named in the essay called the school's principal. School officials notified the juvenile authorities, and the sheriff's deputies arrived to remove Christopher from

school. Ultimately, the charges were dropped, but not before Christopher spent five days in juvenile detention.[7]

As many of these examples demonstrate, a particularly troubling aspect of rigid "get tough" approaches is that they are turning our children into criminals, with the responsibility for dealing with problem behavior in schools now being handed off to an increasingly punitive juvenile justice system. The loss of discretion and "on-the-spot" resolution of conflict can mean a lost opportunity to teach children about respect and a missed chance to inspire their trust of authority figures. *See* Johnson, *Cracking Down*, at A20. It also means, more fundamentally, that schools are less and less a positive socializing force in students' lives, and more and more appendages of the juvenile justice system. Criminalizing youthful misbehavior in schools may have been less of a problem when juvenile courts adhered to a rehabilitative model. However, as explained more fully below, juvenile courts are ill-suited to address behavior ordinarily handled by the schools themselves.

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See also Schwartz, *School Bells,* at 16, citing to Nadine Strossen, *My So-Called Rights,* IntellectualCapital.Com (Sept. 30, 1999) (describing phone calls in "post-Littleton backlash" related to suspensions and expulsions for self-expression).

C. A juvenile court that has become punishment oriented may do more harm than good by adjudicating delinquent a 13-year-old child based on the content of his creative writing assignment.

In the 1990s, virtually every state, including Wisconsin, amended its juvenile code to de-emphasize the rehabilitation of youth in favor of accountability and public safety. These changes have dangerous implications and consequences for children like Douglas, who engage in minor misbehavior. The type of punitive intervention favored by today's juvenile court is not likely to improve the lives of affected children, and may actually disadvantage them.

1. Recent amendments to Wisconsin's Juvenile Act have discarded the protective features of the historic juvenile court.

In 1996, Wisconsin's Legislature adopted a series of amendments to the state's "Children's Code," which significantly altered the operation and purpose of Wisconsin's juvenile courts. Act of Dec. 4, 1995, Wis. Act 77 (codified as Wis. Stat. § 938 et al.). These amendments reflect the Legislature's belief that "although society does not yet classify juveniles' actions as criminal, *they are 'almost there.'*"*See* Juvenile Justice Study Committee, *Juvenile Justice: A Wisconsin Blueprint for Change* (March 1995), at 30 (emphasis added). By taking the delinquency jurisdiction from the Children's Code – where jurisdiction over neglected and dependent children remain – the Juvenile Justice Code breaks with

certain bedrock principles of the original juvenile court reformers: that there was a continuity between neglected and delinquent children; that often the delinquent children came from a deprived background; and that it made sense to handle them in the same system. Today, Wisconsin's juvenile court imposes criminal-like responsibility and accountability on children, as it "punishes" them for their "crimes." It stresses "protect[ion] of the community" and "accountability". Wis. Stat. § 938.01. Moreover, in telling fashion, it erodes the confidentiality provisions applicable to children who commit offenses, *see id.* at §§ 938.396(1) - (8), "a protection which has long been at the heart of the juvenile justice system in this country." Brooks, *School House Hype,* at 27.

2. Douglas D. was improperly referred to the juvenile court.

Despite juvenile courts' historic discourse of "compassionate care" and "individualized treatment," there has long been a disjunction between rehabilitative rhetoric and punitive reality. The criminalization of the juvenile court is all the more troublesome as its docket increasingly involves allegations of non-violent, non-serious misconduct – like that at issue here – which could easily be addressed in other ways.

Additionally, the apparent existence of effective treatment for addressing problem behavior does not justify the punishment meted out to Douglas here. In the absence of a record of past violent or aggressive behavior or severe emotional

disturbance, the fictional depiction of violence penned by Douglas is not by itself alarming. To the contrary, drawings or stories by adolescents with violent content are relatively "normal" forms of expression, which professionals view as a form of sublimation – channeling anger into some form of healthy expression that is acceptable to society. *See The Psychoanalytic Study of the Child*, Vol. 33, New Haven, CT: Yale New Haven Press (1978); Levick, *They Could Not Talk and So They Drew*, at 17, 63 (Chas. C. Thomas, 1983). Moreover, as the courts have consistently held, threats must be placed and considered in light of their entire factual context. *United States v. Gilbert*, 884 F. 2d 454 (9th Cir.1989). Nothing in the record would support a presumption that this fictional writing was – or was intended to be – anything more than a fanciful story about a young boy who "imagines" a way to get back at his "mean" teacher.

In short, a punishment oriented juvenile court is not the place to respond to the sort of behavior seen here. On the other hand, school boards and administrators have long been empowered with the authority and duty to regulate school behavior in order to protect the interests of the student body and the school. Douglas's conduct is school-based behavior that schools *should* handle. Reasonable sanctions can be imposed if students do not adhere to legitimate

conduct regulations.[8]

Indeed, there are growing indications that school-based interventions are effective in curbing aggression and violence in schools. *See* DOE/DOJ, *1999 Annual Report,* at 31-50 (model violence prevention, substance abuse prevention, and problem behavior prevention programs). As noted in a joint guide issued by the U.S. Departments of Justice and Education, safe schools require "having in place many preventive measures for children's mental and emotional problems – as well as a comprehensive approach to early identification of all warning signs that might lead to violence toward self or others." DOE/DOJ, *Early Warning, Timely Response*, at 2. Yet it is critical to recognize that "over-labeling [and] ... stigmatizing children in a cursory way that leads to overreaction is harmful." *Id.* at Introductory Letter. While an over-representation of violence directed at specific individuals consistently over time, for example, "may signal emotional problems and the potential for violence," *id.* at 9, there is a risk in misdiagnosing such signs. Accordingly, the guide notes "it is important to seek the guidance of a qualified professional – such as a school psychologist, counselor or other mental health

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There are risks, however, associated with sanctioning children with suspension and expulsion. Some research shows an association between exclusionary discipline and delinquency, substance abuse, and school drop-out. Brian Bumbarger, *School Violence: Disciplinary Exclusion, Prevention and Alternatives* 3, State Park, PA: Universities Children's Policy Partnership (Univ. of Pittsburg & Pennsylvania State Univ.) (March 1999). Moreover, under a public health model, poor "school bonding" is a risk factor for multiple problems, including violence, substance abuse, delinquency, and drop-out. *Id.*

specialist – to determine ... [the] meaning of [violent writings or drawings.]" *Id.*

Not every expression of anger is a cause for alarm or call for help. Certainly, schools must be attuned to those behaviors that might be a prelude to violence, including the type of indicator seen in this case, i.e. the expression of violence in writing. However, schools' efforts in this regard should be part of an overall strategy aimed at helping students learn how to manage conflict appropriately; creating a culture of mutual respect; and providing services and support to children in need. "Get tough" measures that criminalize our youth and expose them to an increasingly punitive juvenile justice system undermine not only the role that schools can have in promoting citizenry and responsibility among our youth, but also, at bottom, threaten the very notion of education itself.

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IV. CONCLUSION

There are times when school referrals to police and the courts is appropriate and necessary to promote safety and rehabilitation. However, efforts to ensure that schools are safe cannot succeed if they are based on fiction and not fact, and if there is "a cloud of fear over every student in every school." There are occasions when a civil society must curtail expression to protect civility and safety, but this is not one of those cases.

Dated this 6th day of June, 2000.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 2,993 words.

Adam Culbreath by EL

Carol W. Medaris

PROOF OF SERVICE BY MAIL

I, the undersigned, hereby declare that I am employed in the City of Oakland, California. I am over the age of eighteen and not a party to the within entitled cause. My business address is 405 -14th Street, 15th Floor, Oakland, California 94612-2701. I am familiar with the firm's practice for collection and processing of mail, which provides that mail be deposited within the U.S. Postal Service on the same day in the ordinary cause of business.

On June 6, 2000, I served the attached:

NON-PARTY BRIEF OF JUVENILE LAW CENTER AND NATIONAL CENTER FOR YOUTH LAW IN SUPPORT OF DOUGLAS D.

in said cause, by placing three true copies thereof enclosed in a prepaid sealed envelope addressed to:

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for delivery, deposit, and collection to the U.S. Postal Service in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on June 6, 2000.

Ethel L. Oden-Brown

STATE OF WISCONSIN
IN THE SUPREME COURT

No. 99-1767-FT

In the Interest of Douglas D.,
A Person under the Age of 17,

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DOUGLAS D.,

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On Review Of A Decision Of The Court Of Appeals Affirming
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NON-PARTY BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN, INC. IN SUPPORT OF DOUGLAS D.

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STATUTES

STATEMENT OF INTEREST

The American Civil Liberties Union of Wisconsin, Inc. ("ACLU/WI") is a statewide, non-partisan membership organization dedicated to protecting the rights of Wisconsin citizens under the Bill of Rights and the Wisconsin Constitution. The ACLU/WI is the Wisconsin affiliate of the national American Civil Liberties Union. The ACLU/WI has appeared in this and other courts in Wisconsin and in the United States Supreme Court on matters supporting First Amendment rights. While the ACLU/WI is opposed to conduct that poses an immediate and concrete threat of school violence, it is at the same time committed to maintaining the integrity of the First Amendment. That protection is particularly important in cases such as this where First Amendment freedoms are at risk of being eroded by force of popular opinion over highly publicized incidents of school violence. On May 1, 2000, this Court granted permission to file this non-party brief.

INTRODUCTION

This case arises against the backdrop of a national discussion over school violence. And while the parties' briefs debate whether the fear of school violence is real or perceived, the central point is that the debate is not a substitute for rigorous application of First Amendment principles. The ACLU does not advocate violence in schools or speech that leads to violent behavior. But in the wake of highly publicized tragedies such as Columbine, the ACLU is concerned that the courts below misconstrued settled First Amendment precedent in the name of "zero tolerance" of school violence.

Emergent social circumstances can lead to unsound legal precedent. *Korematsu v. United States*, 323 U.S. 214 (1945) (upholding conviction of American of Japanese ancestry for violating exclusion order during World War II); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction of defendants for organizing the Communist Party of the United States). Criminalizing the content of creative writing assignments for the sake of zero tolerance poses the same concerns.

Because of the Constitutional issues involved, this Court's review is *de novo*. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); *State v. Turner*, 136 Wis.2d 333, 343, 401 N.W.2d 827 (1987).

ARGUMENT

I. THE DISORDERLY CONDUCT STATUTE DOES NOT PUNISH CREATIVE WRITING ASSIGNMENTS THAT POSE NO THREAT OF A BREACH OF THE PEACE

A. Douglas' Creative Writing Is Pure Speech Protected By The First Amendment

Creative writing is pure speech protected by the First Amendment. Douglas enjoys these freedoms as a student, just as adults enjoy them in daily activities. *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969). This Court has relied upon the *Tinker* principles in *Theama v. City of Kenosha*, 117 Wis.2d 508, 516-17, 344 N.W.2d 513 (1984) to reaffirm that students have Constitutional rights. "We have reached the point in our society's development where children are being acknowledged as persons deserving of legal rights and protections." *Id.* at 516.

The First Amendment has particular resonance in the school setting where creative expression is strongly encouraged and should not be punished. *Tinker*, 393 U.S. 503; *Thomas v. Board of Educ., Grantville Cent. Sch. Dist.*, 607 F.2d 1043, 1048-49 (2d Cir. 1979). Douglas' essay is a paradigm. Mrs. Caelwaerts instructed him to write the first paragraph of a "Top Secret" story. After being sent to the hall for "clowning around," Douglas completed his assignment in a fashion that most anyone would do -- he wrote a story based upon his experience:

> Well, I knew that I had to write a story and I really didn't have many ideas, and then she kicked me out in the hall, I was kind of like – just gave me an idea.

(Tr. 66:5-14.) The story was unfinished. Douglas testified that he "did not know how anyone else would end it like if they would have ended it where it's all a dream or something." (Tr. 66:11-14).

B. The Disorderly Conduct Statute Does Not Punish Threats; It Punishes Speech That Tends To Provoke A Breach of the Peace

Disorderly conduct charges do not follow automatically because Mrs. Caelwaerts "panicked" and was "very much" bothered by Douglas' story (Tr. 14:24-15:17). The disorderly conduct statute does not punish speech because it is offensive; the disorderly conduct statute punishes speech only if necessary to prevent a breach of the peace.

As this Court pointed out in *Lane v. Collins*, 29 Wis.2d 66, 139 N.W.2d 264 (1965), more than passive fear or upset is required:

> The underlying reason for disorderly conduct statutes and ordinances proscribing abusive language is that such language *tends to provoke retaliatory conduct* on the part of the person to whom it is addressed that amounts to breach of the peace.

Id. at 71-72 (emphasis added). In *Lane* this principle was highlighted by observing that "[c]alling another person a 'son-of-a-bitch' *under charged circumstances* might well constitute abusive language which is likely to have that result [to breach the peace]." *Id.* at 72 (emphasis added).

This Court emphasized the "importance of a coalescing of conduct and circumstances" before disorderly conduct can be found. *State v. Werstein*, 60 Wis.2d 668, 672, 211 N.W.2d 437 (1973). In *State v. Becker*, 51 Wis.2d 659, 665, 188 N.W.2d 449 (1971), "loud yelling" alone would not sustain a disorderly conduct conviction, but "loud yelling" accompanied by pushing and jostling a police officer was disorderly conduct. The point is not whether the interaction is one on one or in a group context; the point is whether the speech poses a realistic risk of a breach of the peace.

All the disorderly conduct cases cited by the State involved evidence of actual disruption or created a circumstance of an imminent breach of the peace. *E.g.*, *State v. Elson*, 60 Wis.2d 54, 62-63, 208 N.W.2d 363 (1973) (testimony that loud speech of lawyer could cause patients in mental institution to become "agitated" and "blow up.") The same rule applies in the school setting. *Tinker*, 393 U.S. at 508 ("There is no indication that the work of the schools or any class was disrupted"). The Supreme Court remained committed to the *Tinker* principles in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) by permitting student speech to be punished only upon a showing of actual disruption.

There is no evidence that Douglas' creative writing assignment would provoke an imminent breach of the peace. Mrs. Caelwaerts had the situation under control. Class continued on for the remaining five minutes until students were dismissed. (Tr. 16:13-17). Mrs. Caelwarts did not speak with Douglas about

the assignment, and nothing happened after the class to cause disruption. (Tr. 16:13-22). When confronted with the situation, Douglas made it immediately clear he did not mean anything by the story. (Tr. 16:23-17:14). In the six week period after the assignment and prior to charges being filed, Douglas continued to attend the same school, albeit with a different English teacher (Tr. 37:14-21), without any incidence of disruption.

Nothing justified criminalizing Douglas' speech as disorderly conduct.

C. The Lower Courts Punished Douglas' Speech As Disorderly Conduct Without Applying The Proper Constitutional Principles

The State cannot criminalize a "threat" in the name of disorderly conduct unless the "threat" fits into one of the "certain well-defined and narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). The Supreme Court has not hesitated to strike down disorderly conduct statutes that reach beyond "fighting words." *E.g., Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *see also City of Houston v. Hill*, 482 U.S. 451 (1987) (striking down statute that punished verbal criticism and challenge to police officers).

The only reason "fighting words" can be punished is because they are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. at 574. *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("fighting words" are "those that provoke immediate violence"). This exception is narrow. *R.A.V. v. City of St.*

Paul, 505 U.S. 377, 428 (1992) ("we have consistently construed the 'fighting words' exception . . . narrowly") (Stevens, J., concurring). It does not apply to Douglas because there was no evidence that his creative writing assignment would provoke immediate retaliation or violence.

Words that create a "clear and present danger" of violence can be regulated at least in the wartime context (*Schenck v. United States*, 249 U.S. 47 (1919)) as can advocacy "directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis supplied). Here there was no evidence to support any finding of imminent and lawless action from Douglas' creative writing assignment; he did not even own a machete. (Tr. 69:7-8.)

The basic Constitutional principle was summarized in Justice Douglas' concurring opinion in *Brandenberg*:

> The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.
>
> The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.
>
> This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.

395 U.S. at 456-57 (Douglas, J, concurring) (internal cite omitted).

The Supreme Court underlined the narrow scope of First Amendment exceptions in *Brandenburg* by reversing the convictions of Ku Klux Klan members because their advocacy of violence, although abhorrent, is protected by the First Amendment. The Supreme Court has twice reaffirmed this holding. In *Hess v. Indiana*, 414 U.S. 105, 108 (1973) the Court reversed a disorderly conduct conviction even though the speech amounted to "advocacy of illegal action at some indefinite future time." In *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 927 (1982), the Court recognized that "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." (Emphasis in original).

Douglas' speech was punished without any consideration of these bedrock constitutional principles. To disregard them now in support of a zero tolerance principle would lead to the odd, if not unjust result that the Ku Klux Klan is free to advocate violence - - "Bury the niggers" - - while Douglas is punished for the content of his creative writing assignment.

II. THE "TRUE" THREAT DOCTRINE DOES NOT ESTABLISH DISORDERLY CONDUCT, BUT IS A LIMITATION ON THE REACH OF THREAT STATUES

Instead of applying the principles in *Chaplinsky* and *Brandenburg*, the lower courts interpreted *Watts v. United States*, 394 U.S. 705 (1969) to mean that "threats" are a First Amendment exception for purposes of a disorderly conduct charge. *Watts* did not so hold, and the ACLUWI is not aware of any published

case, and the parties have cited none, that elevates *Watts* to a general First Amendment exception that creates liability for a threat under a disorderly conduct statute.

A. The "True" Threat Doctrine Is A Constitutional Limitation on the Reach of Threat Statutes

The "true" threat doctrine was developed in *Watts* as a Constitutional *limitation* on the reach of statutes that criminalize threats. In *Watts* the Court confronted the Presidential threat statute which "makes criminal a form of pure speech." *Watts,* 394 U.S. at 707. The only way to make the "threat" statute constitutional was to condition application of the statute on the requirement that as an initial matter the government prove a "true" threat.

The First Amendment places this limitation on "threat" statutes to protect wide-ranging speech and avoid the risk of chilling unpopular, if not offensive speech however "vituperative, abusive and inexact." *Watts*, 394 U.S. at 708. The "true" threat doctrine is narrow, and excludes political hyperbole from punishment. Outside of political speech the "true" threat doctrine excludes statements from punishment that are a "merely crude or careless expression of political enmity." *Rogers v. United States*, 422 U.S. 35, 44 (1975) (concurring opinion of Justices Douglas and Marshall).

The "true" threat doctrine does not apply because the State did not charge Douglas for violating the applicable Wisconsin threat statute, Wis. Stat.

§ 947.013(1m). Still, the application of the "true" threat doctrine is instructive. The common elements that qualify the statements as "true" threats are that they are unilateral, unambiguous, direct and concrete. Several examples illustrate the point:

- "Ronnie, Listen Chump! Resign or You'll Get Your Brains Blown Out." *United States v. Hoffman*, 806 F.2d 703, 704 (7th Cir. 1986).
- "I am writing you this letter to tell you that you will die within the next six months." *United States v. Manning*, 923 F.2d 83, 84 (8th Cir. 1991).
- "I will have all of you killed! When? You'll never know! Where? You'll never know! Why? Only me and you know Bill [Clinton]. *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997).

Unlike these statements, Douglas was trying to complete a creative writing assignment. The content of that assignment is hardly an unambiguous, direct and concrete threat akin to the tenor of those in the case law. By any reasonable comparison, Douglas' third person fictional creative writing assignment was a benign work in progress. Douglas did not even expect Mrs. Caelwaerts would read it until it was finished. (Tr. 69: 9-20.)

B. Unlike Disorderly Conduct Statutes, Threat Statutes Require Intent To Threaten To Establish a Criminal Conviction

Although the State is punishing Douglas for making a threat, the State did not charge him (or attempt to make any proofs) under a threat statute. Threats are not equivalent to disorderly conduct. The State highlights the difference by arguing that a person serving a lengthy prison sentence can be prosecuted for

making a "true" threat from prison. (Resp., Br., p. 8, fn 1). Regardless of whether a message from prison is a threat, it cannot reasonably be argued that a threat made from prison amounts to disorderly conduct unless it can be established that the threat falls within the *Chaplinsky* or *Brandenburg* exceptions.

Even under a threat statute, a "true" threat cannot be criminally punished without evidence of intent to threaten. *Watts*, 394 U.S. at 708 ("we have grave doubts about [punishing a threat without an intent to make a threat]"). Lower courts have debated the question of what intent is required: some require subjective intent to threaten, *United States v. Kelner*, 534 F.2d 1020, 1023 (2d Cir. 1976); others require only an objective test - - an intent to make a statement that the speaker would foresee that the recipient would interpret as a threat. *E.g.*, *United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986); still others have applied an even looser standard - - whether a reasonable recipient would interpret the statement as a threat. *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994).

By focusing on disorderly conduct and Mrs. Caelwaert's personal reaction, the trial court did not examine any of these standards and made no findings as to whether Douglas had any intent to make a threat. (See Tr. 76:11-79:18). The court of appeals suggested in a footnote that the *Hoffman* standard applied, but like the trial court did not make any analysis. (Pet. Ap. 105, ¶ 9, fn. 5). Since the State proceeded under a disorderly conduct theory, there is nothing

in the record to support the conclusion that Douglas intended to threaten Mrs. Caelwaerts.

Douglas could not have been convicted for making a "threat" because the "threat" statute requires the State to prove an "intent to harass or intimidate:"

> Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:
>
> (a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.

Wis. Stat. § 947.013(1m). The conclusion is supported by a recent court of appeals decision involving an analogous "threat" statute (Wis. Stat. § 940.203) where the State conceded that the term "intent" requires an intent to threaten. *State v. Perkins*, No. 99-1924-CR, slip op. at ¶ 12, available at 2000 WL 535468 (Ct. App. May 4, 2000).

Requiring a subjective intent to threaten adheres to the demands of the First Amendment. In *Rogers v. United States*, 422 U.S. 35 (1975), the Supreme Court granted *certiorari* to resolve this question, but ultimately decided the case on a procedural matter. Justice Marshall, joined by Justice Brennan, issued a comprehensive concurring opinion rejecting the objective standard for a "threat" because negligence standards cannot be inferred in the criminal law:

> In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes;

> we should be particularly wary of adopting such a standard for a statute that regulates pure speech.

Id. at 47. (Marshall, J., concurring) (citations omitted).

By prosecuting Douglas' "threat" as disorderly conduct, the State punished Douglas' speech without carrying its burden of proving the legal standard for a "threat" that is required by statute and demanded by the First Amendment. At the same time, by using Douglas' "threat" as a proxy for disorderly conduct the State avoided its obligation to prove that his speech fell into the narrow exceptions in *Chaplinsky* or *Brandenburg*. The net effect of this procedure was to mix and match legal doctrine in such a way to discard the First Amendment protections that Douglas is entitled to enjoy.

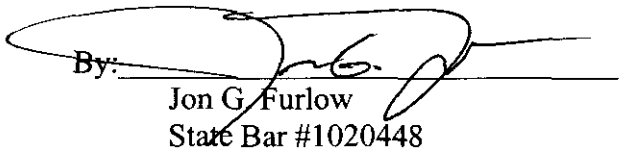
CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Dated this 31st day of May, 2000.

Respectfully submitted,

MICHAEL BEST & FRIEDRICH LLP



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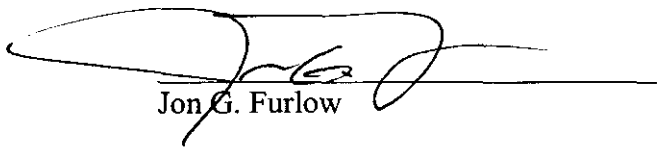
CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 2,961 words.



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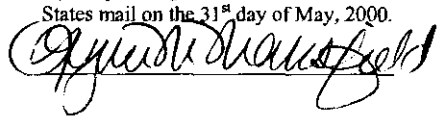
The undersigned hereby certifies that a true copy of the foregoing instrument was served upon an attorney of record of each party to the above-entitled cause addressed to each such attorney at their respective address as disclosed by the pleadings of record herein, via United States mail on the 31st day of May, 2000.



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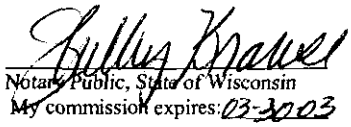

Notary Public, State of Wisconsin
My commission expires: 03-31-03